Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

PATRICK HARTEY,

Petitioner,

v.

DONALD VAUGHN, SUPERINTENDENT, SCI, GRATERFORD; THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY; and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. MAY A FEDERAL COURT ON HABEAS REVIEW UNDERTAKE A REEVALUATION OF A PURE QUESTION OF STATE LAW (HERE THE SUFFICIENCY AND SPECIFICITY OF A TRIAL OBJECTION), OVERRULE THE STATE COURTS ON IT, AND PRECLUDE CONSIDERATION OF AN OTHERWISE PRESERVED HABEAS CLAIM?

A. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT'S INSTRUCTIONS WHICH IN DEFINING ACCOMPLICE LIABILITY VIOLATED DUE PROCESS OF LAW BECAUSE THEY OMITTED AN ELEMENT OF THE CRIME AND DILUTED THE COMMONWEALTH'S BURDEN OF PROOF?

II. MAY THE THIRD CIRCUIT PRECLUDE CONSIDERATION OF THE MERITS OF AN INEFFECTIVENESS OF COUNSEL CLAIM (HERE THE FAILURE TO OBJECT TO THE COURT'S INSTRUCTIONS) BY HOLDING THAT THE MERE FACT THAT THE STATE COURT CONSIDERED THE INEFFECTIVENESS CLAIM ELIMINATED ALL PREJUDICE REGARDLESS OF WHETHER THE CONSIDERATION AFFORDED BY THE STATE COURT RESULTED IN CLEARLY ERRONEOUS CONCLUSIONS OF LAW UNDER THE CONSTITUTION WHICH DENIED PETITIONER DUE PROCESS OF LAW AND HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL?

III. IS THE OMISSION OF THE MOST ESSENTIAL ELEMENT OF THE CRIME OF FIRST DEGREE MURDER IN THE COURT'S FINAL INSTRUCTIONS TO THE JURY PREJUDICIAL UNDER *NEDER* WHEN TRIAL COUNSEL FAILED TO OBJECT TO THE INSTRUCTIONS AND THE ISSUE WAS RAISED ON HABEAS AS INEFFECTIVENESS OF COUNSEL?

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The Petitioner Patrick Hartey respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit which was entered in the above-entitled case on July 30, 1999 with Reargument being denied on August 30, 1999.

OPINIONS BELOW

The Order of the Third Circuit denying Reargument dated August 30, 1999 is found in the appendix at page 1a.

The Opinion of the United States Court of Appeals for the Third Circuit, entitled *Hartey v. Vaughn*, 186 F.3d 367 (3d Cir. 1999) with Judge Noonan dissenting is included in the appendix attached at pages 3a-22a.

The Certificate of Appealability from the Third Circuit had granted by Judges Sloviter, Mansmann, and Alito and is found in the appendix at pages 23a-24a.

Judge Hutton's Order dated November 12, 1997 adopting the Report and Recommendation of the Magistrate and his opinion is included in the appendix at pages 25a-40a. Judge Hutton refused to grant a certificate of appealability. Magistrate Judge Faith Angell's Report and Recommendation dated April 1, 1997 is also included in the appendix at pages 41a-63a.

Following his conviction in the state courts, petitioner made three unsuccessful attempts to have his case heard on direct appeal. On each occasion, court appointed counsel failed to file the Appellant's Brief in timely fashion causing the dismissal of the direct appeal. Present counsel succeeded in having the direct appellate right reinstated for the fourth

time, and the Superior Court decided the direct appeal adversely to petitioner in a published opinion — *Commonwealth v. Hartey*, 621 A.2d 1023 (Pa. Super. 1993) on March 16, 1993. (Appendix pgs. 67a-79a). Allocatur was sought, and denied by the Pennsylvania Supreme Court per an Order dated August 18, 1994 which is found in the appendix at page 65a. Petitioner asked the Pennsylvania Supreme Court to reconsider its denial of Allocatur and its Order denying Reconsideration of the Denial of Allocatur dated March 23, 1995 is found in the Appendix at page 64a.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Invoking federal jurisdiction under 28 U.S.C. § 2254 and 28 U.S.C. § 1254 petitioner filed a petition for a writ of habeas corpus by a person in state custody in the United States District Court for the Eastern District of Pennsylvania on March 24, 1997. The Magistrate Judge recommended that the Writ be denied, and the United States District Judge, The Honorable Herbert J. Hutton adopted the Report and Recommendation of the Magistrate and denied the writ without granting a certificate of appealability. Petitioner sought a Certificate of Appealability from the Third Circuit which was granted by Judges Sloviter, Mansmann, and Alito.

The Third Circuit denied relief in a published opinion 2-1 panel decision with Senior Judge Noonan from the Ninth Circuit who was sitting by designation dissenting. *See Hartey v. Vaughn*, 186 F.3d 367 (3d Cir. 1999) (Appendix pgs. 3a-22a). Petitioner sought rehearing which was denied on August 30, 1999 and that Order is found in the Appendix at pg. 1a.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Nor shall any State deprive any person of life, liberty or property without due process of law . . .

The Fourteenth Amendment incorporates the Sixth Amendment's guarantee to the effective assistance of counsel:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A. Proceeding and Disposition in the Courts Below

Petitioner was tried in the Court of Common Pleas of Philadelphia County before a jury on charges of Murder, Conspiracy and Possession of an Instrument of Crime. He was tried with his co-defendant, Thomas McCandless. Both were convicted of first degree murder on August 20, 1982.

At all times the Commonwealth maintained that McCandless was the actual killer (the shooter), and petitioner was his accomplice in this homicide.

Petitioner's trial counsel took a timely appeal to the Pennsylvania Superior Court on May 16, 1984 which was dismissed on September 20, 1985 because he failed to file the Appellant's Brief.

This procedure repeated itself with the next two attorneys who represented Hartey. On May 23, 1990 present counsel filed a Petition seeking to have the direct appellate right reinstated which was granted on March 6, 1992. Present counsel handled the direct appeal which was unsuccessful. *Commonwealth v. Hartey*, 621 A.2d 1023 (Pa. Super. 1993) on March 16, 1993. (Appendix pgs. 67a-79a).

Present counsel filed a habeas petition in the United States District Court for the Eastern District of Pennsylvania. It was assigned to the Honorable Herbert Hutton who assigned it to Magistrate Judge Faith Angell whose recommended that the writ be denied was adopted by Judge Hutton who denied a Certificate of Appealability.

A Certificate of Appealability was granted by the Third Circuit, which denied all relief after oral argument in a published 2-1 panel decision — *Hartey v. Vaughn*, 186 F.3d 367 (3d Cir. 1999) with Judge Noonan, Senior Judge from the Ninth Circuit who sat by designation, dissenting.

B. Statement of the Facts

Petitioner was convicted on the worst kind of evidence — the testimony of a person charged with this very homicide who dealt with the prosecutor to secure the promise of his release on bail after his preliminary hearing testimony against petitioner and McCandless and who was promised the dismissal of all charges against him, including the murder charge, but only after his testimony against petitioner and McCandless at trial. This witness was John Barth.

Barth testified against petitioner and McCandless at their Preliminary Hearing on April 1, 1982, and was later admitted

to bail. Barth fled prior to trial and the Commonwealth was allowed to use his Preliminary Hearing testimony at trial against petitioner. It was the *only* evidence linking petitioner to the crime.[1]

Deliberate, but transparent, efforts to bolster the Barth testimony were made by the Commonwealth and these bolstering/vouching efforts comprise one of the two issues this Court is asked to review.

Barth's preliminary hearing testimony revealed that Stebelski came into a garage rented by McCandless, and shortly thereafter petitioner drew a firearm and ordered Barth and Stebelski to "freeze".

McCandless "went and got the weapon off Hartey" and "instructed" Hartey to open the trunk of the car, an instruction with which Hartey complied. McCandless told Stebelski to get into the trunk, and as Stebelski moved toward the trunk Hartey "backed away from [the trunk]." Stebelski "bolted toward the door." (N.T. 8/10/82 pgs. 778-780). McCandless fired three shots at him as he ran.

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1. McCandless' conviction was reversed by the Third Circuit in *McCandless v. Vaughn*, 172 F.3d 255 (3d Cir. 1999) which held that the prosecution did not make a good faith effort to locate Barth prior to trial and therefore the notes of his preliminary hearing testimony were inadmissible. Hartey, whose direct appeal was finally taken five years after the McCandless direct appeal did not raise the preliminary hearing issue in the state courts because McCandless had raised it and lost on it. Hartey did not want to disparage his direct appeal with an issue that had been resolved against his co-defendant, which was the law of the case and which would weaken his direct appeal. When the Third Circuit decided *McCandless*, Hartey tried to amend his habeas in the Third Circuit so as to include the McCandless claim but the Third Circuit refused to allow the amendment.

Barth testified he opened the garage door for McCandless' car to exit, and after the car exited, petitioner pulled the door down. Barth ran to his car, stepped over the deceased Stebelski, "and . . . left." (N.T. 8/10/82 pg. 782).

Barth testified that he had been arrested on this murder case and given a preliminary hearing in March of 1981 during which sufficient evidence was introduced to have him held for court. He remained in prison without bail until September of 1981 when he dealt with the Commonwealth. His understanding of his deal was that all charges against him, including the murder charge, would be dropped after his trial testimony. (N.T. 8/10/82 pgs. 783-787).

Over petitioner's objection, Joseph Murray, Esquire, the Chief of the Homicide Unit in the Philadelphia District Attorney's Office was permitted to testify. His testimony unconstitutionally bolstered Barth's testimony.

Joseph Murray testified that in his capacity as Chief of the Homicide Unit in the Philadelphia District Attorney's Office that he told Barth's lawyer that if Barth gave a statement to the police concerning his knowledge of the incident and that

> *if his [Barth's] statement was corroborated by the investigation, the factors in the investigation* — . . . that we would agree, if he were to testify against the other defendants in this case, and that — (pause) — if he were to agree to testify against the other defendants in this case *in conformity with the statement as corroborated by the investigation* — . . . that we would, number one,

> get him out on bail in this case, we would nolle prosse the charges against him.

(N.T. 8/11/82 pgs. 802, 803) (Emphasis supplied).

This testimony validated the prosecutor's opening statement when she told the jury the following about witness Barth:

> He [Barth] gave a statement to the District Attorney's Office and at that particular stage no deals were made as to the disposition of his own charges. *Other steps were taken to verify whether Mr. Barth's statement was accurate and after such steps were taken*, the District Attorney's Office agreed that John Barth's testimony against Thomas McCandless and Pat Hartey at trial, the charges against him would be nolle prossed, which means dropped; those charges would be dropped.

(N.T. 8/9/82 pg. 490) (Emphasis supplied).

This opening set the stage for Chief of Homicide Joseph Murray's testimony, which aligned the prosecutor, the DA's Chief of Homicide and the subsequent police investigation against petitioner by assuring the jury that collectively they had other independent evidence corroborating Barth's testimony. Taken either separately or together, these transparent efforts provided an open-ended invitation to the jury to believe that other incriminating evidence, not of record, confirmed Barth's statement/testimony against petitioner.

The court charged twice on accomplice liability for first degree murder (once in the body of his final instructions and once in response to a question from the deliberating jury). Trial counsel did not object to any of the accomplice liability instructions and petitioner urged throughout the state court proceedings that he was ineffective for not objecting because the jury instructions significantly diluted the Commonwealth's burden of proof as to the most critical element of the crime of being an accomplice to a first degree murder, the crime for which petitioner stands convicted. By diluting the constitutional burden of proof of an element of the crime charged these instructions violated due process of law.

In Pennsylvania an accomplice can only be convicted of first degree murder if he is found beyond a reasonable doubt by the jury to share the specific intent to kill with the actual slayer. In other words, it is not enough to convict an accomplice of first degree murder for the prosecution to show that two or more persons conspired to commit an illegal act and in committing an illegal act one of the conspirators killed another person, even if it is foreseeable that the illegal act committed would endanger human life. Nor is it enough to show that during the illegal act the actual slayer formulated the specific intent to kill unless the accomplice or co-conspirator also formulated and harbored the specific intent to kill.

Here, the court charged twice:

> An accomplice is one who knowingly and voluntarily cooperates, or aids another in committing *a crime*.
>
> . . . .

> Instead, an accomplice is someone who knowingly, voluntarily, and purposely joins with someone else *in performing an illegal act.*

(N.T. 8/19/82 pgs. 1516-17; 1555-56) (Emphasis supplied).

In Pennsylvania, as held in *Commonwealth v. Chester, Pa.*, 733 A.2d 1242 at 1253 n.12 (1999), first degree murder as to an accomplice has always required far more than a showing of a general conspiracy:

> A general accomplice charge, while legally correct on the law of accomplice liability, when given in conjunction with a charge of first degree murder, must clarify for the jury that the specific intent to kill necessary for a conviction of first degree murder must be found present in both the actual killer and the accomplice.

The accomplice liability instructions were outcome determinative to petitioner because harboring the specific intent to kill is the most critical element of first degree murder — for either the actual slayer or an accomplice. When that element of the crime is diluted so that proof of joining "with someone else *in performing an illegal act*" suffices, the instructions violate due process of law because they remove an element of the crime from the jury's consideration or so misdescribe it as to effectively remove it from the jury's consideration.

When jury instructions lift the state's burden of proof as to an element of the offense, they run afoul of the due process clause. *Carella v. California*, 491 U.S. 263, 265, 105 L. Ed. 2d 218, 221, 109 S. Ct. 2419, 2420 (1989) held:

> The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. Jury instructions relieving States of this burden violate a defendant's due process rights. Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases.

See also Sandstrom v. Montana, 442 U.S. 510, 520-22, 61 L. Ed. 2d 39, 48-49, 99 S. Ct. 2450, 2457-58 (1979); *Francis v. Franklin*, 371 U.S. 307, 85 L. Ed. 2d 344, 105 S. Ct. 1995 (1985) and *Smith v. Horn*, 120 F.3d 400, 416 (3d Cir. 1997).

The jury was confused as to the law governing petitioner's responsibility as an accomplice. It asked the court during deliberations:

> Can two people being tried for the same charge be guilty of different degrees of murder?

(N.T. 8/19/82 pg. 1554)

The answer to this question was clearly, "Yes", and petitioner's jury should have been told that a finding of differing degrees of murder in the context of this case was a permissible and indeed logical response, depending on what the jury found to be Hartey's intent. Had the jury found that Hartey only intended that the victim be frightened, harmed, hurt, hurt badly, or otherwise lacked the specific intent to kill, he could not be convicted of first degree murder.

Petitioner's trial attorney asked that the above question asked by the deliberating jury be answered, "Yes." The trial court refused to answer this question, and asked the jury to go out and clarify its question. Trial counsel made no objection to this request of the trial court. The jury then asked the Court to "explain what an accomplice is according to the law". (N.T. 8/19/82 pg. 1555).

The judge repeated his accomplice charge — repeating his errors and for a second time — and again invited the jury to convict Hartey of first degree murder if it found that he, as an accomplice joined in the "commission of a crime or "purposely join[ed] with someone else in performing *an illegal act*." (N.T. 8/19/82 pgs. 1555, 1556) (Emphasis supplied).

There is a world of difference between an accomplice aiding in the commission of *a* crime or an accomplice *joining in an illegal act* and an accomplice sharing and harboring the specific intent to kill which is a necessary element of first degree murder.

The difference between those concepts is the measure of the dilution of the Commonwealth's constitutional burden of proof as to first degree murder, the crime of which petitioner stands convicted.

The Third Circuit denied relief on the accomplice charge issue in a strange manner. The panel majority did not reach the merits of petitioner's accomplice claim because it ignored the state appellate court finding that trial counsel did not object to the charge on the grounds raised in this habeas. The Third Circuit reviewed the record and somehow divined that trial counsel did make an objection under state law.

Because the Third Circuit found that trial counsel had objected, it said it did not reach petitioner's ineffectiveness claim which was based on trial counsel's failure to object. Judge Noonan strenuously disagreed, and found that trial counsel was ineffective for not objecting to the instructions which denied petitioner due process.

Petitioner's claim was a Sixth Amendment ineffectiveness of counsel claim predicated on the fact that trial counsel did not object to the due process denying accomplice instructions twice given to his client's jury. The Superior Court of Pennsylvania had held that counsel had not objected and reached the merits of Petitioner's ineffectiveness argument. *Commonwealth v. Hartey*, 424 Pa. Super. 29, 621 A.2d 1023 (1993) (Appendix 67a-79a).

When District Judge Hutton precluded Petitioner's ineffectiveness claim on the ground that trial counsel had objected and could not have been ineffective (30a-36a) the Commonwealth, to its credit, did not seek victory in the Third Circuit on that specious ground, and candidly conceded that trial counsel's grousing was nowhere close to the due process denying claim that Petitioner has always advanced through the state and federal courts. Said the Commonwealth of Pennsylvania in its Brief in the Third Circuit at page 23, note 7:

> 7 Judge Hutton found that counsel had preserved an objection to the trial court's charge on accomplice liability. As Hartey concedes, however, the objection raised was not the one currently forwarded. Brief for Appellant at 49. The state superior court correctly assessed this claim as one of counsel's ineffectiveness, . . . ,

> and it is in this manner that it must be assessed here.

The Third Circuit panel majority found that trial counsel did object, found an implicit objection (unheard of under state law), and precluded merit consideration of the accomplice claim by finding that because counsel objected he could not have been ineffective. *Hartey v. Vaughn*, 186 F.3d 367, 369, 370 (3d Cir. 1999).

Judge Noonan dissenting stated:

> The majority in this court states: 'We need not evaluate the accomplice liability instruction itself because we conclude that the record establishes that Hartey's counsel was effective on this issue by making a preserving his objections.' But, in no way did counsel point out the *Sandstrom* error. No one looking at the vague and halting remonstrance of counsel could imagine that he was calling the attention of the trial judge to a problem of constitutional dimensions and citing to Supreme Court authority already five years old and already employed to vacate a number of state criminal convictions.

Hartey v. Vaughn, 186 F.3d 367, 375 (3d Cir. 1999) (17a-22a).

In other words, the Third Circuit panel majority totally ignored both the Pennsylvania Superior Court and the Commonwealth of Pennsylvania on the issue of trial counsel's failure to object. The panel majority chose to apply its own version of state law to the various, but legally innocuous, complaints made by trial counsel in regard to

the court's failure to respond affirmatively to one of the deliberating jury's questions and found that to be a sufficient objection, albeit "implicit" to bar consideration of petitioner's due process denying accomplice liability instructions on ineffectiveness of counsel grounds. What was not and what would never be an objection sufficient to preserve a constitutional claim under state law was alchemized into just such an objection by the Third Circuit. This is hardly the meaningful review promised by habeas jurisprudence.

The *Hartey* majority went even further in its alternative holding that, "In any event, the Superior Court considered Hartey's challenge to the accomplice liability instruction, and thus Hartey suffered no prejudice from counsel's alleged failure to preserve his objections to the instruction."

The accomplice claim was raised in the state courts by allegations of ineffectiveness. The ineffectiveness went to the failure of trial counsel to object at trial which — absent ineffectiveness allegations — precluded state appellate review of the accomplice charge. The Superior Court found that there was no objection made at trial and held that the accomplice charge given was not unconstitutional.

To the extent that the Third Circuit opinion can be read to mean that once a state court affords review on an ineffectiveness of counsel claim further federal review is precluded, petitioner submits it is not only unreasonable but its application would eviscerate many valid ineffectiveness claims on habeas review.[2]

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2. Judge Noonan in dissent pointed out that the mere fact of review by the state court did not satisfy the ineffectiveness claim (Cont'd)

A claim that counsel was ineffective for not preserving an issue for appeal means far more than counsel was ineffective for not giving the appellate court an opportunity to review the claim not raised. It means that the omitted claim is valid, and that had trial counsel properly preserved it the appellate court would have, or should have, granted relief on the claim not preserved. To limit such an ineffectiveness claim to mere state appellate consideration, even if such consideration reaches a totally unconstitutional conclusion, as here, is to deny meaningful habeas review to one who has preserved his habeas claim.

Petitioner seeks review here as to the Third Circuit's power to re-examine state law governing what is and what is not a proper objection, as to the panel majority's startling conclusions that once an unpreserved claim is considered by a state appellate court — even if such consideration denies due process — there is no further resulting prejudice to the defendant, and as to the dilution of the burden of proof the most critical element of the crime against him — his specific intent to kill.

(Cont'd)
stating, "But the Superior Court reached the unconstitutional conclusion that the accomplice instructions were correct; and therefore the Superior Court did not adequately address Hartey's contention that his counsel failed to object to them." (Slip opinion, pg. 13-14)

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO REVIEW:

(1) WHETHER A FEDERAL COURT ON HABEAS REVIEW CAN UNDERTAKE A REEVALUATION OF A PURE QUESTION OF STATE LAW (HERE THE SUFFICIENCY AND SPECIFICITY OF A TRIAL OBJECTION), OVERRULE THE STATE COURTS ON IT, AND PRECLUDE CONSIDERATION OF AN OTHERWISE PRESERVED HABEAS CLAIM; AND

(2) TO DETERMINE WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT'S INSTRUCTIONS WHICH IN DEFINING ACCOMPLICE LIABILITY VIOLATED DUE PROCESS OF LAW BECAUSE THEY OMITTED AN ELEMENT OF THE CRIME AND DILUTED THE COMMONWEALTH'S BURDEN OF PROOF.

A federal court on habeas review has no business deciding what is and what is not a proper objection under state law. Once the state court has decided, as here, that the objection raised was not sufficient under state law to preserve the claim, a federal court is bound by that determination. *See* § 2254(e)(1); *Burden v. Zant*, 498 U.S. 433, 112 L. Ed. 2d 962 (1991), and *Burden v. Zant*, 510 U.S. 132, 126 L. Ed. 2d 611 (1994). *See also Estelle v. McGuire*, 502 U.S. 62, 67-68, 116 L. Ed. 2d 385, 396, 112 S. Ct. 475 (1991) ("Today, we

reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.")

The *Hartey* majority, heedless of state law governing objections,[3] gleaned from the record that "counsel asked for the accomplice charge to include an instruction that the jury should consider the evidence against each defendant separately. The judge rejected this instruction and counsel noted his objections for the record." This was thought by the panel majority to be an objection sufficient to raise Hartey's due process claim that the Commonwealth's burden of proof was diluted and remarkably, it so held. *Hartey*, *supra*, at 186 F.3d 374 (3d Cir. 1999)

The *Hartey* majority surprisingly found that counsel's objections to the failure of the trial court to answer a question from the deliberating jury with a "Yes" or "No" answer "implicitly" encompassed Hartey's due process claim. The jury had asked whether two individuals tried for the same charge could be innocent or guilty of different degrees of murder. *Hartey v. Vaughn*, 186 F.3d 367, 374 (3d Cir. 1999) (16a). To the extent that *Hartey* holds that a federal court can review state court determinations as to what under state law constitutes a sufficient objection, Hartey submits that it has made a fundamental error which requires either the granting of certiorari by this Court or a remand to the Third Circuit with directions to rule on the merits of Hartey's accomplice claim.

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3. In the Pennsylvania state courts an objection must be more than an outcry; it must be specific. When it provides a specific basis, any ground not covered in the basis of the objection is waived. *Commonwealth v. Witherspoon*, 481 Pa. 312 n.4, 392 A.2d 1313 n.4 (1979); *Commonwealth v. Pitts*, 486 Pa. 212, 404 A.2d 1305 (1979); *Commonwealth v. Arroyo, Pa.*, 723 A.2d 162, 170 (1999).

It is well established that "the Due Process Clause [of the Fourteenth Amendment] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

Under Pennsylvania law, an accomplice in a crime during which a killing occurs may not be convicted of first-degree murder unless the Commonwealth proves that he or she harbored the specific intent to kill. Although the Commonwealth need not prove that the accomplice actually committed the killing, it must prove that the accomplice intended that the killing occur. *See* Pa. C.S.A. § 2502(a); *Commonwealth v. Huffman*, 536 Pa. 196, 638 A.2d 961 (1994); *Commonwealth v. Bachert*, 271 Pa. Super. 72, 412 A.2d 580 at 583 (1980), *overruled on other grounds*, 499 Pa. 398, 453 A.2d 931 (1982); *Commonwealth v. Thompson*, 543 Pa. 634, 674 A.2d 217, 222 (1996); *Commonwealth v. Wayne, Pa.*, 720 A.2d 456, 464 (1998). *Bachert* was the law at the time of petitioner's trial. *Chester*, *supra*.

In this case the trial court repeatedly led the jury to believe that petitioner, as an accomplice could be convicted of first degree murder if he "voluntarily, and purposely joins with someone else *in performing an illegal act*" (N.T. 8/19/82 pg. 1516-17) (emphasis supplied) and again, in response to the jury's request for a redefinition of accomplice liability, the court instructed the jury that, petitioner as an accomplice could be found guilty of first degree murder if he joined in the commission of a crime or "purposely join[ed] with someone else in performing an illegal act." (N.T. 8/19/82 pgs. 1555, 1556).

Joining in the commission of a crime or in performing an illegal act is a far cry from possessing and sharing the

specific intent to kill. The record reveals several illegal acts that the jury could have used to convict petitioner as an accomplice to McCandless' first degree murder. Petitioner Hartey was said to have first drew and pointed a firearm at two people in the garage. He was said to have allowed McCandless to take the firearm from him. When McCandless directed Hartey to open the trunk of a car in the garage, Hartey did so, and then stepped back when McCandless ordered Stebelski (the deceased) to get into the trunk. When Stebelski bolted towards the garage door, McCandless shot him.

Hartey could have joined with McCandless in several illegal acts that fell far short of first degree murder. He had and drew a firearm and pointed it at two people, allowed McCandless to take the firearm from him, he followed at least one of McCandless' orders by opening the trunk of a car in the garage.

According to the charge of the court Hartey could have been convicted of first degree murder because he joined with McCandless in committing the above-mentioned illegal acts, even absent specific intent to kill on his part.

Arguably, but barely so, the above illegal acts could have been evidence of a specific intent to kill and the jury perhaps could have so found. The point is that the trial court did not instruct them that they had to find Hartey's specific intent to kill from the evidence and allowed Hartey to be convicted even if he did not have or was not found to have had the requisite specific intent to kill which is the most essential element of the crime of first degree murder under Pennsylvania law.

II.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE IF THE THIRD CIRCUIT CAN PRECLUDE CONSIDERATION OF THE MERITS OF AN INEFFECTIVENESS OF COUNSEL CLAIM (HERE THE FAILURE TO OBJECT TO THE COURT'S INSTRUCTIONS) BY HOLDING THAT THE MERE FACT THAT THE STATE COURT CONSIDERED THE INEFFECTIVENESS CLAIM ELIMINATED ALL PREJUDICE REGARDLESS OF WHETHER THE CONSIDERATION AFFORDED BY THE STATE COURT RESULTED IN CLEARLY ERRONEOUS CONCLUSIONS OF LAW UNDER THE CONSTITUTION WHICH DENIED PETITIONER DUE PROCESS OF LAW AND HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL?

The panel majority held at 186 F.3d 373, 374:

> We need not evaluate the accomplice liability instruction itself because we conclude that the record establishes that Hartey's counsel was effective on this issue by making an preserving his objections. In any event, the Superior Court considered Hartey's challenge to the accomplice liability instruction, and thus Hartey suffered no prejudice from counsel's alleged failure to preserve his objections to the instruction.

See Strickland v. Washington, 466 U.S. 694, 80 L. Ed. 2d 674, 104 S. Ct. 2068 (1984) (defendant must show prejudice caused by counsel's conduct to succeed on ineffective assistance of counsel claim).

The panel majority took the position that the accomplice charge in *Hartey* should not be evaluated on its merits because: (1) there was an objection to it made during trial; and (2) because even if no objection was made, the only

prejudice arising from the ineffectiveness claim was the lack of state court review and since the state court reviewed the claim, there was no prejudice.

Petitioner's ineffectiveness claim meant the following: (1) there was an unconstitutional series of jury instructions given to his jury on the most critical aspect of his case; (2) his attorney failed to object to these instructions. The state courts held that there was no objection, but found the instructions constitutional. Petitioner's ineffectiveness claim meant that he was prejudiced by the giving of unconstitutional jury instructions. Once the state court held that the instructions were not unconstitutional in denying his ineffectiveness claim, that claim was exhausted and preserved for habeas review as a Sixth Amendment ineffectiveness claim.

It simply is unacceptable for a federal court to rule that the only prejudice arising from the failure of trial counsel to object was the inability of an appellate to consider the claim, and once the appellate court considers the claim on ineffectiveness grounds — whether or not its analysis is constitutional — prejudice suddenly disappears. To allow this kind of review on federal habeas would be to eviscerate it to the point that it could hardly be called meaningful, and Judge Noonan clearly recognized that in his dissent.

III.

THIS COURT SHOULD GRANT CERTIORARI AND DETERMINE IF THE OMISSION OF THE MOST ESSENTIAL ELEMENT OF THE CRIME OF FIRST DEGREE MURDER IN THE COURT'S FINAL INSTRUCTIONS TO THE JURY WAS PREJUDICIAL UNDER *NEDER* WHEN TRIAL COUNSEL FAILED TO OBJECT TO THE INSTRUCTIONS AND THE ISSUE WAS RAISED ON HABEAS AS INEFFECTIVENESS OF COUNSEL?

Omitting an element of the crime charged from jury consideration or diluting the constitutional burden of proof thereof when the subject of a timely objection is subject to harmless error analysis. *See Neder v. United States*, __ U.S. __, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999).

Because Hartey's claim was preserved as a Sixth Amendment ineffectiveness claim he must show more than harmless error — he must show prejudice in the *Strickland* sense, and he can readily do that.

When the most critical element of the crime charged is omitted or so misdescribed as to be effectively removed from the jury's consideration, it cannot be said that the accused has been found guilty by a jury.

The jury was so confused about the law pertaining to an accomplice that it asked the judge two questions — the first was:

> Can two people being tried for the same charge be guilty of different degrees of murder?

(N.T. 8/19/82 pg. 1554).

Instead of answering the question, the trial court instructed the jury to rephrase its question. The jury then asked for a redefinition of accomplice liability.

The jury was obviously unsure of whether or not the law allowed them to return a verdict less than first degree for Hartey.

Obviously some of the jurors believed that it was not legally permissible to return different degrees of murder when two persons were both charged with first degree murder and one (Hartey) at least committed several illegal acts which may have assisted McCandless. This confusion alone, which went uncorrected because the court chose to ask the jury to rephrase its question, is more than ample prejudice.

But in addition to the above confusion on the part of Hartey's jurors, the trial court twice provided instructions that omitted all reference to a specific intent to kill on Hartey's part and which allowed the jury to convict Hartey of first degree murder if it but found that he joined in the commission of a crime or "purposely join[ed] with someone else in performing an illegal act." (N.T. 8/19/82 pgs. 1555, 1556). These instructions so misdescribed the element of specific intent to kill as to remove it from the jury's consideration and allowed the jury to convict on far less evidence than the law required because it severely diluted the most essential element of the crime charged. *See Smith v. Horn*, 1290 F.3d 400, 416 (3d Cir. 1997). These instructions were given in the body of the final instructions and when the court asked the jury to rephrase its question and the jury in turn asked for a redefinition of accomplice liability, they were repeated. Because Hartey's jury was invited to convict him without finding beyond a reasonable doubt that he had

committed all of the elements of first degree murder as an accomplice he was prejudiced and prejudiced severely.[4]

Specific intent to kill was never conceded by Hartey's attorney. Nor is it clear from the evidence that this was Hartey's intent. Whether or not Hartey harbored or possessed the specific intent to kill was a jury question and there is evidence and arguments on both sides of it. In such circumstances, prejudice abounds.

This Court should grant certiorari because this case would be one of the first opportunities to decide what does and what does not prejudice an accused under both *Strickland* and *Neder* [5] when an element of the crime is omitted and unconstitutionally diluted. This is a far closer case than *Neder* was — indeed, the element of the crime was not contested in *Neder*, and the evidence against Neder on the omitted element was absolutely overwhelming. That cannot be said here.

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4. "Lest there remain any doubt about the constitutional statute of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, *supra* at 397 U.S. 364, 25 L. Ed. 2d at 375 (1970).

5. *Neder* involved a timely objection at trial. Hartey's case involves ineffectiveness of counsel. This court has not yet reviewed a claim that an element of the crime charged was omitted from the jury's consideration under *Strickland*.

IV.

THIS COURT SHOULD ALSO GRANT REVIEW ON THE BOLSTERING ISSUE AND MAKE IT CLEAR THAT CASES MUST BE TRIED ON THE EVIDENCE PRESENTED IN THE COURTROOM, AND NOT ON THE BASIS OF ASSERTIONS BY THE STATE THAT OTHER EVIDENCE NOT PRESENTED CONFIRMED THE MINIMAL EVIDENCE ACTUALLY PRESENTED.

Joseph Murray, the Chief of the Philadelphia District Attorney's Homicide Unit testified as follows:

> BY MISS FOULKES (the prosecutor):
>
> Q. What, if anything, did you say to Mr. Haaz [Barth's attorney], sir?
>
> A. (No Answer)
>
> Q. With regard to anything he said to you?
>
> A. Well, in response to what Mr. Haaz [Barth's attorney] said to me, I indicated —
>
> MR. GALLAGHER: Objection again.
>
> THE COURT: Overruled. Go ahead.
>
> THE WITNESS: May I continue?
>
> THE COURT: Tell us what you said.

THE WITNESS: Thank you very much. I said that if Mr. Barth gave a statement to the police concerning his knowledge of the incident and that *if his statement was corroborated by the investigation, the factors in the investigation* —

MR. GALLAGHER: Objection.

THE COURT: Overruled. Go ahead.

THE WITNESS: — that we would agree, if he were to testify against the other defendants in this case, and that — (pause) — if he were to agree to testify against the other defendants in this case *in conformity with the statement as corroborated by the investigation* —

MR. GALLAGHER: Objection.

THE COURT: Go ahead.

THE WITNESS: — that we would, number one, get him out on bail in this case, we would nolle prosse the charges against him.

BY MISS FOULKES:

Q. What does nolle prosse mean?

A. Nolle prosse means to dismiss, to have the charges dismissed by a judge and we would recommend that that be done to the judge.

(N.T. 8/11/82 pgs. 802, 803; A. 45-46) (Emphasis supplied).

This testimony validated the prosecutor's opening statement when she told the jury the following about witness Barth:

> He [Barth] gave a statement to the District Attorney's Office and at that particular stage no deals were made as to the disposition of his own charges. *Other steps were taken to verify whether Mr. Barth's statement was accurate and after such steps were taken*, the District Attorney's Office agreed that John Barth's testimony against Thomas McCandless and Pat Hartey at trial, the charges against him would be nolle prossed, which means dropped; those charges would be dropped.

(N.T. 8/9/82 pg. 490; A. 44) (Emphasis supplied).

This opening set the stage for Chief of Homicide Joseph Murray's testimony, and aligned the prosecutor, the DA's Chief of Homicide and the subsequent police investigation against petitioner by assuring the jury that collectively they had other independent evidence corroborating Barth's testimony. Taken either separately or together, these transparent efforts provided an open-ended invitation to the jury to believe that other incriminating evidence, not of record, confirmed Barth's statement/testimony against petitioner.

Nothing limited Murray's testimony as to a subsequent investigation to evidence the jury would or had heard. An open ended invitation was extended to petitioner's jury to believe that other evidence, not of record, firmly corroborated Barth's account — for otherwise, why would the Chief of Homicide drop all charges, including murder against Barth.

As this Court has held where the prosecutor's summation was an invited response to that made by the defense in *United States v. Young*, 470 U.S. 18, 84 L. Ed. 2d 1, 14, 105 S. Ct. 1038 (1985):

> The concerns underlying our reactions against improper prosecutorial arguments to the jury are implicated here, but not to the extent that we conclude that the jury's deliberations were compromised. The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government rather than its own view of the evidence.

See Berger v. United States, 295 U.S. at 88-89, 79 L. Ed. 1314, 55 S. Ct. 629 (1935).

Here, the prosecutor injected his own opinion that subsequent investigation proved Barth to so credible that the murder and related charges against him would be dropped. That opinion was not lost on petitioner's jury which was asked to trust in the subsequent investigation and the people who conducted it.

When the prosecution is permitted to inject such a wholesale invitation to a jury in a criminal case the most fundamental of all precepts falls — a jury must make its decision based only on the evidence presented. Unless it can be said that a jury did just that, the trial is cannot comport with due process as we know it.

CONCLUSION

For the reasons expressed above, Petitioner urges this Court to grant certiorari and review the decision of the United States Court of Appeals for the Third Circuit or in the alternative, remand this matter to the Third Circuit with instructions to consider the claim that trial counsel was ineffective for failing to object to the accomplice definition imparted to petitioner's jury on its merits.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING RECONSIDERATION DATED AUGUST 30, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-2034

PATRICK HARTEY,

Appellant

v.

DONALD VAUGHN,
THE DISTRICT ATTORNEY OF THE
COUNTY OF PHILADELPHIA;
THE ATTORNEY GENERAL OF THE STATE
OF PENNSYLVANIA

On Appeal from the United State District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 96-06812)

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Judge*, and SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, and NOONAN, *Circuit Judges*,

The petition for rehearing filed by the appellant, Patrick Hartey, in the above captioned matter having been submitted

to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Noonan votes to grant rehearing before the original panel.

BY THE COURT:

s/ [illegible]
Circuit Judge

AUG 30 1999

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED JULY 30, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-2034

PATRICK HARTEY,

Appellant

v.

DONALD VAUGHN,
THE DISTRICT ATTORNEY OF THE
COUNTY OF PHILADELPHIA;
THE ATTORNEY GENERAL OF THE STATE
OF PENNSYLVANIA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 96-06812)
District Judge: Honorable Herbert J. Hutton

Argued October 8, 1998

BEFORE: GREENBERG, NYGAARD, and
NOONAN,* *Circuit Judges*

(Filed: July 30, 1999)

* * *

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* Honorable John T. Noonan, Jr., Senior Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

Appendix B

OPINION OF THE COURT

GREENBERG, *Circuit Judge*:

I. INTRODUCTION

Patrick Hartey, the petitioner in this habeas corpus proceeding under 28 U.S.C. § 2254, appeals from an order of the district court entered on November 14, 1997, adopting the report and recommendation of a magistrate judge dated April 1, 1997, and denying Hartey's petition without an evidentiary hearing. Inasmuch as both the magistrate judge and the district court wrote comprehensive opinions, *see Hartey v. Vaughn*, 1997 WL 710946 (E.D. Pa. Nov. 14, 1997) (district court opinion), the Superior Court of Pennsylvania wrote a published opinion on Hartey's direct appeal, *see Commonwealth v. Hartey*, 621 A.2d 1023 (Pa. Super. Ct. 1993), and we recently wrote a published opinion in a habeas corpus case brought by Thomas McCandless, a codefendant, *see McCandless v. Vaughn*, 172 F.3d 255 (3d Cir. 1999), we only need summarize the background of the case.

In August 1982, the Commonwealth of Pennsylvania tried Hartey and McCandless together in the Philadelphia Common Pleas Court for crimes arising from the murder of Theodore Stebelski. Originally, the police arrested John Barth for the murder, but in part as a result of information Barth supplied, the Commonwealth refocused the investigation on Hartey and McCandless. The prosecution's theory at the trial was that McCandless and Hartey killed Stebelski so that he could not testify against McCandless at a criminal trial. Although the prosecution intended to call

Barth as a witness to testify about the killing, and expected that his testimony would directly link Hartey to the murder scene, Barth did not appear at trial. The trial judge ruled, however, that Barth's preliminary hearing testimony could be read into the record as a substitute for his live testimony and the court permitted its use against both defendants. The jury convicted both Hartey and McCandless of first degree murder, criminal conspiracy, and possession of an instrument of crime.

Unfortunately, Hartey's original attorneys (not counsel on this appeal) did not prosecute his appeal appropriately and thus there were substantial delays in his direct appellate process. When the appeal finally was prosecuted, Hartey presented six issues to the Superior Court, all framed as ineffective assistance of counsel claims. The Superior Court denied all six claims on the merits in its published opinion. *See Commonwealth v. Hartey*, 621 A.2d 1023. Hartey thereafter unsuccessfully sought allocatur from the Supreme Court of Pennsylvania, *Commonwealth v. Hartey*, 656 A.2d 117 (Pa. 1993), advancing only four of the claims.

Then on October 4, 1996, Hartey filed the proceedings in the district court leading to this appeal, raising the following four issues which he also had presented to the Pennsylvania Superior and Supreme Courts:

> 1. Trial counsel was ineffective for failing to object to the Court's accomplice instruction which permitted the conviction of an accomplice based on his joining the actor in 'an illegal act' and failed to focus the attention of the jury on whether or

not the accomplice shared or harbored the specific intent to kill that had to be found as to the actor.

2. Trial counsel was ineffective for failing to preserve his objections to the improper bolstering of the Barth preliminary hearing testimony in his written post trial motions, and was also ineffective for failing to object to the improper bolstering of the Barth testimony by the prosecutor in her opening address.

3. Trial counsel was ineffective for failing to object to the Court's exclusion of defense witnesses who would have testified to the poor reputation for truth and veracity on the part of the most critical Commonwealth witness, John Barth.

4. Trial counsel was ineffective for failing to properly preserve his objection to the Court's refusal to answer the first jury inquiry in the affirmative.

On this appeal Hartey raises only the first two issues noted above but expands on them as he presents them as both ineffective assistance of counsel claims and due process claims. Hartey's refocusing of the claims is understandable as our order granting the certificate of appealability recites as follows:

The foregoing request for a certificate of appealability is granted for the purpose of

deciding whether Hartey's right to due process was denied by: (1) the prosecutor's opening statement and the testimony of Assistant District Attorney Murray which may have led the jury to believe that the prosecution had independent evidence corroborating witness Barth's testimony that was not presented to the jury. *See United States v. Molina-Guevara*, 96 F.3d 698, 704-705 (3d Cir. 1996); *United States v. DiLoreto*, 888 F.2d 996, 999 (3d Cir. 1989), overruled in part, on other grounds, by *United States v. Zehrbach*, 47 F.3d 1252 (3d Cir. 1995) (en banc); and (2) the court's instruction regarding the definition of an accomplice. *See Smith v. Horn*, 120 F.3d 400, 411-15 (3d Cir. 1997); *Rock v. Zimmerman*, 959 F.2d 1237, 1246 (3d Cir. 1992).

Nevertheless, we must consider our order granting the certificate of appealability in the context of this case, which established that Hartey pursued a writ of habeas corpus in the district court solely on ineffective assistance of counsel grounds, and the court denied the writ concluding that Hartey was not entitled to relief on that theory. Thus, we are constrained to assess Hartey's claims under the Sixth Amendment and not under the Due Process Clause. *See Smith v. Farley*, 25 F.3d 1363, 1365 n.2 (7th Cir. 1994) (claims not raised before district court in habeas petition are waived on appeal).

Appendix B

II. DISCUSSION

At the outset of our discussion of the merits of Hartey's claims we refer to our recent opinion in *McCandless v. Vaughn*, 172 F.3d 255. In that habeas corpus proceeding under 28 U.S.C. § 2254, we granted a writ to McCandless, Hartey's co-defendant, on the ground "that the prosecution did not fulfill its duty to protect McCandless's constitutional right to confront the key witness [John Barth] against him." *See McCandless*, 172 F.3d at 258. Hartey, however, did not raise this Confrontation Clause claim before the Pennsylvania state courts or in the district court. In fact, Hartey did not advance this point even in his primary briefs to this court; instead, he challenged his incarceration based on this confrontation violation only *after* we requested the parties to submit letter briefs detailing what effect, if any, *McCandless* had on this appeal. Thus, Hartey cannot raise the confrontation issue at this late date, and *McCandless* cannot control our result on this appeal. *See Baker v. Barbo*, 177 F.3d 149, 156 n.7 (3d Cir. 1999).

Hartey seeks to avoid this rather obvious result by relying on *Finney v. Zant*, 709 F.2d 643, 646-47 (11th Cir. 1983), for the proposition that "justice" requires that we permit him to obtain relief on the basis of *McCandless*. Certainly, we can understand how it might appear to be incongruous that only one of two petitioners can obtain relief on the basis of a constitutional error apparently applicable to both. Nevertheless, habeas corpus law involves the application of well-established principles that, among other things, recognize the comity between the federal and state courts and usually require that a petitioner under 28 U.S.C. § 2254

present his claims for relief in the first instance in the state courts. We are not at liberty to disregard these principles because our concept of what "justice" might require and thus Hartey's failure to raise the Confrontation Clause issue until after argument on this appeal bars him from relying on it now. Therefore, we confine our discussion to the ineffective assistance of counsel claims that are actually before us.[1]

The thrust of Hartey's claim relating to the prosecutor's opening statement and Murray's testimony is that they invited the jury to believe that independent evidence not presented to it corroborated Barth's preliminary hearing testimony. Hartey's challenge to the jury instructions centers on their alleged failure to inform the jury that it could convict him of first degree murder only if it determined that he, rather than merely McCandless, had a specific intent to kill.

Inasmuch as Hartey (unlike McCandless) filed his habeas corpus petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") we must apply the standard of review as required by that Act in 28 U.S.C. § 2254(d). The AEDPA greatly circumscribes our review of state court decisions. Thus, we recently indicated that the AEDPA

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1. We delayed our decision on this appeal pending disposition of *McCandless*, which was argued before we heard argument in this case. Moreover, we further delayed our decision in order to give the parties an opportunity to file letter briefs commenting on *McCandless*. As it happens, however, *McCandless* is of limited significance here because that case turned on an issue not properly before us on this appeal.

> mandates a two-part inquiry; first, the federal court must inquire whether the state court decision was 'contrary to' clearly established federal law, as determined by the Supreme Court of the United States; second, if it was not, the federal court must evaluate whether the state court judgment rests upon an objectively unreasonable application of clearly established Supreme Court jurisprudence.

Matteo v. Superintendent, 171 F.3d 877, 880 (3d Cir. 1999) (en banc). Accordingly, as we explained in *Matteo*, section 2254(d) "firmly establishes the state court decision as the starting point in habeas review." *Id.* at 885. Of course, on this appeal we exercise plenary review over the order of the district court as that court did not conduct an evidentiary hearing and nothing in the AEDPA or *Matteo* requires that we do otherwise. *See Cabrera v. Barbo*, 175 F.3d 307, 312 (3d Cir. 1999); *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 291 n.5 (3d Cir. 1991).

A. *Improper Vouching*

Hartey's first claim is that his trial counsel was ineffective for failing to object to improper vouching for Barth's preliminary hearing testimony, which he alleges illegally bolstered the statements of the key witness against him. Specifically, Hartey complains that there was improper vouching when the prosecutor stated in her opening argument that the government's agreement with Barth was based on "verifying" his statements, and when Assistant District Attorney Murray testified that the agreement was conditioned on "corroborating" Barth's information. Hartey is correct that

federal law establishes that reference to extra-record evidence by the government constitutes improper bolstering that, in certain circumstances, may justify a reversal of a defendant's conviction. *See United States v. DiLoreto*, 888 F.2d 996, 998-99 (3d Cir. 1989) (overruled in part, on other grounds, by *United States v. Zehrbach*, 47 F.3d 1252, 1267 (3d Cir. 1995) (en banc)). Thus, an attorney's failure to object to the government's improper vouching for its witnesses could give rise to an ineffective assistance of counsel claim.

The Pennsylvania Superior Court, however, rejected Hartey's ineffective assistance claim because it concluded that there had not been improper vouching. *See Hartey*, 621 A.2d at 1026-27. The court noted first that, under state law, it was the government's obligation to provide full disclosure about any favorable agreements reached with its witnesses. *See id.* at 1026. Then, it stated that the prosecutor's statements and Murray's testimony had not referred to extra-record evidence as the government presented corroborating evidence during the trial. *See id.* at 1027. Specifically, the court pointed to the testimony of the medical examiner, who confirmed Barth's account of how the murder had occurred, as well as other evidence establishing the ill will between McCandless and Stebelski. *See id.*

Applying the *Matteo* standard, we cannot conclude that the Superior Court's application of law was contrary to established Supreme Court precedent or was an unreasonable application of clearly established Supreme Court jurisprudence. A defendant's ineffective assistance of counsel claim can succeed only if he can show that counsel's conduct was professionally unreasonable. *See Strickland v.*

Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). Thus, if there is no merit to Hartey's claims that the prosecution's statements and Murray's testimony should not have been permitted at trial, his counsel cannot be deemed ineffective for not having objected to their presentation, as it was not unreasonable for him to acquiesce in the presentation of proper statements and testimony.

We have indicated that a determination of whether there has been improper vouching and, if so, whether there should be a reversal must be determined on a case by case basis. *See United States v. Zehrbach*, 47 F.3d at 1264-67. Moreover, much as did the Superior Court, we have looked to the extensive trial record to determine whether an allegedly improper statement in fact referred to extra-record evidence. *See DiLoreto*, 888 F.2d at 999.

The Superior Court's conclusion that the government presented corroborating evidence at Hartey's trial was not contrary to clearly established federal law as determined by the Supreme Court and was not an unreasonable application of Supreme Court jurisprudence. *See* 28 U.S.C. § 2254(d)(2) (stating that district court can grant writ for petitioner in state custody if state court decision was based on unreasonable determination of the facts). For instance, the prosecution presented the medical examiner's opinion that the victim, Stebelski, first had been hit with a blunt object on the head and then shot in the back. This testimony confirmed Barth's statements that McCandless had pistol-whipped Stebelski and then shot him as he was running away. Other evidence that generally supported Barth's statements included testimony that McCandless had a motive to kill Stebelski,

who had brought various criminal complaints against McCandless and shot at McCandless' wife's car, that Stebelski came to McCandless' garage that day at McCandless' urging, and that the garage, which McCandless owned, contained the type of bullets used in the shooting.

Hartey argues, however, that this corroborating evidence did not verify *his* involvement in the murder but only that of McCandless. We find this argument unconvincing. The prosecutor and Murray spoke merely of corroborating Barth's account of how the murder occurred; the evidence presented at trial supplied this corroboration. The jury was thus free to infer, although it need not have done so, that given the accuracy of Barth's account in many respects, his statements implicating Hartey were also accurate.

Therefore, we conclude that the Superior Court did not act unreasonably in finding that there had not been improper vouching because the prosecution had in fact presented evidence corroborating Barth's statements at trial. Like the Superior Court, we have reversed convictions based on improper vouching only where we have concluded that evidence in the record could not have supported the prosecution's statements. *See DiLoreto*, 888 F.2d at 999 (reversing on direct appeal where prosecutor in closing argument stated that its witnesses were not liars because government does not "take liars" but there was no evidence presented at trial of how government ascertains the honesty of its witnesses); *United States v. Molina-Guevara*, 96 F.3d 698, 704-05 (3d Cir. 1996) (reversing on direct appeal where prosecutor stated in closing that had an absent witness testified, he would have confirmed the testimony of other

government witnesses). For us to grant a writ in this case would require us to hold that the government *never* may reveal that its agreement with a witness included a corroboration requirement, even when it presents corroborating evidence at trial. Neither Supreme Court jurisprudence nor our own case law requires such a ruling, and therefore, applying the *Matteo* standard, we must reject Hartey's ineffective assistance of counsel claim based on his attorney's failure to object to and preserve objections to improper vouching.[2]

B. *The Jury Charge*

We now consider Hartey's claims that his counsel was ineffective for failing to object and preserve his objection to the accomplice liability charge read to the jury. The Superior Court explained this issue as follows:

> Appellant next contends that trial counsel was ineffective for failing to object to the trial court's jury charge. Specifically, appellant argues that the court's charge directed the attention of the jury to the state of mind of the co-defendant and permitted appellant's conviction based on the state of mind of the co-defendant. Appellant asserts that

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2. We also note that this is not a case where the government emphasized the corroboration required by its agreement throughout the trial. The prosecutor mentioned the verification requirement briefly in her opening, and Murray, who testified early in this ten-day trial, referred to it at only one point in his testimony, within the context of describing Barth's agreement with the government. The prosecutor did not discuss the issue in her closing statement.

> the court never informed the jury that in order to convict appellant of first degree murder it had to find, beyond a reasonable doubt, that appellant had the specific intent to kill.

Commonwealth v. Hartey, 621 A.2d at 1028. Once again, the Superior Court disposed of the issue by looking at the underlying merit of Hartey's claim; it found that counsel was not ineffective because the jury instructions were correct.

We need not evaluate the accomplice liability instruction itself because we conclude that the record establishes that Hartey's counsel was effective on this issue by making and preserving his objections. In any event, the Superior Court considered Hartey's challenge to the accomplice liability instruction, and thus Hartey suffered no prejudice from counsel's alleged failure to preserve his objections to the instruction. *See Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068 (defendant must show prejudice caused by counsel's conduct to succeed on ineffective assistance of counsel claim).

As we have indicated, the trial transcript shows that Hartey's counsel did object to the accomplice liability charge. As the district court discussed in its decision, the transcript reveals that Hartey's counsel sought changes to the accomplice liability instruction that the trial judge rejected. For instance, counsel asked for the accomplice charge to include an instruction that the jury should consider the evidence against each defendant separately. The judge rejected this instruction and counsel noted his objections for the record. Finally, when the jury showed its confusion about

the nature of accomplice liability by asking during its deliberations whether two individuals tried for the same charge could be innocent or guilty of different degrees of murder, Hartey's counsel vigorously argued that the trial court should simply answer this question yes. Such an answer implicitly would have told the jury that it had to consider the intent of each defendant separately. The judge disagreed with Hartey's counsel, stating his view that, legally, the answer to the question should be no. Ultimately, over counsel's objection, the court asked the jurors to rephrase their question and then re-read to them the charge it previously had given on accomplice liability. Based on these facts, and particularly in light of the Superior Court's consideration of Hartey's challenge to the instruction on the merits, we find that Hartey's counsel was not ineffective under *Strickland*.

III. CONCLUSION

For the foregoing reasons the order of November 14, 1997, will be affirmed.

Appendix B

NOONAN, Circuit Judge, dissenting:

Before the Pennsylvania Superior and Supreme Courts, Hartey's first point on appeal was this: "Trial counsel was ineffective for failing to object to the Court's accomplice instruction which permitted the conviction of an accomplice based on his joining the actor in 'an illegal act' and failed to focus the attention of the jury on whether or not the accomplice shared or harbored the specific intent to kill that had to be found as to the actor."

Hartey made ineffective assistance of counsel in regard to this instruction his first claim in his habeas petition to the district court. As the majority observes, it is this claim that is before us now.

Hartey was tried for a murder committed by McCandless, as to which the state's theory was that Hartey was an accomplice. The trial court instructed the jury: "A defendant is guilty of a crime if he is an accomplice of another person who commits a crime. He is an accomplice if with the intent of promoting or facilitating the commission of the crime, he solicits, commands, encourages, requests the other person to commit it, or aids, agrees to aid or attempts to aid the other person in planning or committing it. . . . You may find the defendant guilty of a crime on the theory that he was an accomplice as long as you are satisfied beyond a reasonable doubt that the crime was committed and that the defendant was an accomplice of the person who committed it."

The trial court went on to define murder in the first degree. It instructed the jury that first degree murder was an

intentional killing. Intentional killing, the court said, was "by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing. Therefore, in order to find the defendants guilty of murder in the first degree, you must find that the killing was a wilful, deliberate, and premeditated act. You must ask yourself the question, Did the defendants have the wilful, deliberate and premeditated specific intent to kill at the time of the killing?"

Defense counsel did not competently object to these instructions. The instructions, however, permitted the jury to convict Hartey of first degree murder if it found that he had the intent of promoting McCandless's crime of murder. Under Pennsylvania law, specific intent to kill is an ingredient of first degree murder. *See Smith v. Horn*, 120 F.3d 400, 411 (3rd Cir. 1997). The trial court omitted this factual requirement and so instructed the jury in a way contrary to *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979). Defense counsel's failure to object to *Sandstrom* error constituted ineffective assistance. It fell below professional standards of competence and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984).

The commonwealth contends that the jury instructions were correct as the decision of the Superior Court so holds, *Commonwealth v. Hartey*, 621 A.2d 1023, 1028 (Pa. Super. Ct. 1993), and that this decision of state law binds this court. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); 28 U.S.C. § 2254(d)(1). But the omission in a jury instruction of an element of the crime is contrary to *Sandstrom*; the Superior Court's endorsement of the error does not supply the omission or correct the error.

Appendix B

The majority in this court states: "We need not evaluate the accomplice liability instruction itself because we conclude that the record establishes that Hartey's counsel was effective on this issue by making and preserving his objections." But in no way did counsel point out the *Sandstrom* error. No one looking at the vague and halting remonstrance of counsel could imagine that he was calling the attention of the trial judge to a problem of constitutional dimensions and citing to Supreme Court authority already five years old and already employed to vacate a number of state criminal convictions. *See e.g., Arroyo v. Jones*, 685 F.2d 35, 39-41 (2d Cir. 1982); *Guthrie v. Warden, Maryland Penitentiary*, 683 F.2d 820, 826 (4th Cir. 1982).

The majority opinion goes on to say, "In any event, the Superior Court considered Hartey's challenge to the accomplice liability instruction and thus Hartey suffered no prejudice from counsel's alleged failure to preserve his objections to the instructions." But the Superior Court reached the unconstitutional conclusion that the accomplice instructions were correct; and therefore the Superior Court did not adequately address Hartey's contention that his counsel failed to object to them.

The Superior Court contented itself with noting that the trial court's charge on accomplice liability had "mirrored the relevant statutory definitions" and that the trial court had told the jurors to ask themselves if "the defendants" had the "premeditated specific intent to kill at the time of killing." *Commonwealth v. Hartey*, 621 A.2d at 1028. The reference to "the defendants" in the plural did not save a charge that had unequivocally told the jury they could find Hartey to be

guilty as an accomplice to murder if he had had the intent of promoting the killing. The single reference to "defendants" was cloudy; it was not specified that each of the defendants must independently have the specific intent to kill; a juror could reasonably have understood that the intent of one defendant should be attributed to the other as the instruction on accomplice suggested. At the very least, the instruction, if taken to require the specific intent to kill on the part of the accomplice, was contradicted by the instruction on accomplice liability. Contradictory instructions cancel each other out, leaving no instruction. They do not cure the *Sandstrom* error. The error was of constitutional dimension. *See Smith v. Horn*, 120 F.3d at 415. So was counsel's failure to object to it.

The commonwealth has a fallback position: the error was harmless because the jury convicted Hartey of conspiracy to murder, and conspiracy to murder is an agreement intentionally to kill. The commonwealth relies on the trial court's instruction that first degree murder consists in intentional killing. But the trial court's instruction on conspiracy to murder blunted the focus on intentional killing by stating that the jurors would have to find that in planning or committing murder "the defendants do so with the intent of promoting or facilitating the commission of the crime of murder." Specific intent to kill was not noted. That the jury was in fact at sea because of the erroneous instruction is confirmed by their note during deliberations asking the court "to explain what an accomplice is according to law" in response to which the court magnified its error by repeating its accomplice instructions without objection. In any event, the commonwealth's point has no relevance now. Hartey was

sentenced to no less than five, and no more than ten, years on the conspiracy count, the term to run concurrently with his life imprisonment for murder. Long ago he finished his sentence for conspiracy.

Hartey's claim of ineffective assistance of counsel in his prosecution for murder suffices for him to be accorded habeas. Two further considerations make grant of the great writ not only legally appropriate but morally fair. First, review of Hartey's case is narrowly circumscribed by the AEDPA because no less than three members of the bar undertook to represent him in the 1980's and defaulted his state appeal by failing to file an appellate brief. The Superior Court cured these defaults as best it could by reinstating the appeal. No federal remedy exists for the harm that they inflicted on Hartey. But no one familiar with the AEDPA can doubt that Hartey's position today has suffered because of these lapses by his lawyers.

Second, Thomas McCandless, the co-defendant, the already-convicted murderer, has been held by this court to deserve a new trial. *See McCandless v. Vaughn*, 172 F.3d 255, 270 (3d Cir. 1999) It is possible, indeed it is likely, that he will walk. The opinion of this court throws out the principal testimony offered against him by John Barth seventeen years ago, "the only substantial evidence implicating McCandless in the murder." *Id.* at 266. Barth, the missing witness whose preliminary hearing testimony the state then relied on, is now deceased, apparently having committed suicide after being arrested in a drug bust. As our opinion in *McCandless* observes, the state "did not expend the minimal effort necessary" to get a warrant for

telephone records by which they could track Barth and have him on hand for the trial. *Id.* at 268. The prosecutor's efforts to locate their star witness were "casual." *Id.* The prosecutor "did not satisfy its Sixth Amendment duty to make reasonable good faith efforts to obtain Barth's presence at trial." *Id.* at 270.

Hartey was as deeply injured by the prosecutor's procedure as McCandless. This court finds that a procedural bar, enacted in the interest of state-federal comity, forbids us to consider this injury now. This court concedes that the disparate results "might appear to be incongruous." Not incongruous, I should say, but unjust. It is good that there be a way, not procedurally barred, by which the injustice may be avoided.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT GRANTING CERTIFICATE OF APPEALABILITY

May 21, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. *97-2034*

PATRICK HARTEY

vs.

DONALD VAUGHN, ET AL.

(E.D. PA. CIV. NO. 96-CV-06812)

Present: SLOVITER, MANSMANN AND ALITO, *CIRCUIT JUDGES*

Submitted are:

(1) Appellant's request for a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(1);

(2) Appellant's memorandum of law in support thereof; and

(3) Appellee's memorandum of law in opposition thereto in the above-captioned case.

Respectfully,

Clerk

Appendix C

ORDER

The foregoing request for a certificate of appealability is granted for the purpose of deciding whether Hartey's right to due process was denied by: (1) the prosecutor's opening statement and the testimony of Assistant District Attorney Murray which may have led the jury to believe that the prosecution had independent evidence corroborating witness Barth's testimony that was not presented to the jury. *See United States v. Molina-Guerva*, 96 F.3d 698, 704-705 (3d Cir. 1996); *United States v. DiLoreto*, 888 F.2d 996, 999 (3d Cir. 1989), overruled in part, on other grounds, by *United States v. Zehrbach*, 47 F.3d 1252 (3d Cir. 1995) (en banc); and (2) the court's instruction regarding the definition of an accomplice. *See Smith v. Horn*, 120 F.3d 400, 411-15 (3d Cir. 1997); *Rock v. Zimmerman*, 959 F.2d 1237, 1246 (3d Cir. 1992).

By the Court,

s/ [illegible]
Circuit Judge

Dated: JUN -5 1998

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED AND FILED NOVEMBER 14, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 96-6812

PATRICK HARTEY

v.

DONALD T. VAUGHN, et al.

MEMORANDUM AND ORDER

HUTTON, J. November 12, 1997

Presently before the Court are the Report and Recommendation of United States Magistrate Judge M. Faith Angell, the Petitioner Patrick Hartey's Objections to the Report and Recommendation, and the Government's Response thereto. Also before the Court are the Petitioner's Supplementary Objections and the Government's Answer thereto. For the reasons set forth in this Order and in Magistrate Angell's Report and Recommendation, the Petition for Writ of Habeas Corpus is denied.

Appendix D

I. BACKGROUND

On August 20, 1982, after a jury trial before the Honorable Albert F. Sabo of the Court of Common Pleas of Philadelphia County, Patrick Hartey ("Hartey") was convicted of murder in the first degree, criminal conspiracy, and possession of an instrument of crime, under Pennsylvania law. The facts of the case are discussed at length in Magistrate Angell's Report and Recommendation and need not be repeated here.

In this action, Hartey argues that he is entitled to a writ of habeas corpus, under 28 U.S.C. § 2254 (1994), on the ground that he received ineffective assistance of counsel at his state trial. *See Strickland v. Washington*, 466 U.S. 686, 687 (1984). In his original Petition, Hartey identified four areas in which his trial counsel allegedly was deficient.[1] After

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1. These grounds were:

1. Trial counsel was ineffective for failing to object to the Court's accomplice instruction which permitted the conviction of an accomplice based on his joining the actor in "an illegal act" and failed to focus the attention of the jury on whether or not the accomplice shared or harbored the specific intent to kill that had to be found as to the actor.

2. Trial counsel was ineffective for failing to preserve his objections to the improper bolstering of the Barth preliminary hearing testimony in his written post trial motions, and was also ineffective for failing to object to the improper bolstering of the Barth testimony by the prosecutor in her opening address.

(Cont'd)

Magistrate Angell issued her Report and Recommendation finding no merit in any of his arguments, Hartey filed the present objections, challenging her resolution of the first two. The Court will consider them in turn.

II. DISCUSSION

In *Strickland v. Washington*, the Supreme Court established that a habeas petitioner can upturn a conviction on which he received ineffective assistance of counsel, but only if trial counsel made such serious errors that he was not functioning as the "counsel" guaranteed under the Sixth Amendment. *See Strickland*, 466 U.S. at 687. The Third Circuit has recently stated the Strickland standard as follows:

> To establish ineffective assistance of counsel, a convicted defendant must show both that: (1) counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms;" and (2) that the defendant suffered prejudice as a result—that is, there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

(Cont'd)

3. Trial counsel was ineffective for failing to object to the Court's exclusion of defense witnesses who would have testified to the poor reputation for truth and veracity on the part of the most critical Commonwealth witness, John Barth.

4. Trial counsel was ineffective for failing to properly preserve his objection to the Court's refusal to answer the first jury inquiry in the affirmative.

Sistrunk v. Vaughn, 96 F.3d 666, 670 (3d Cir. 1996) (citing *Strickland*, 466 U.S. at 687).

In reviewing the reasonableness of counsel's performance, the Court must "indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance." *Berryman v. Morton*, 100 F.3d 1089, 1094 (3d Cir. 1996) (quoting *Reese v. Fulcomer*, 946 F.2d 247, 253 (3d Cir. 1991), *cert. denied*, 503 U.S. 988 (1992)). Therefore, counsel's conduct can only be deficient for *Strickland* purposes where the convicted defendant shows that it was objectively unreasonable and incapable of interpretation as sound trial strategy. *See id.* But even where counsel's conduct is shown to be truly deficient, *Strickland's* second prong requires the convicted defendant to show that the deficiency was so material as to throw into question the fairness and outcome of the trial. *See id.* Only where he has made both showings is he entitled to habeas relief. *See id.*

A. *Failure to Object to Accomplice Instruction*

Hartey first claims that trial counsel was ineffective because of his alleged failure to object to Judge Sabo's instruction on accomplice liability.

1. *Trial Counsel Clearly Objected to Instruction*

In her Report and Recommendation, Magistrate Angell indulged Hartey by assuming that his trial counsel did not object to Judge Sabo's accomplice instruction. (Report and Recommendation at 8). This Court, however, is not bound

by Magistrate Angell's assumption. In its independent review of the trial transcript, the Court finds that trial counsel did indeed object to the instruction, and objected vigorously.

After discussing the separate charges against Hartey and his co-defendant Thomas McCandless, Judge Sabo gave the jury the following instruction:

> Under the law in Pennsylvania, you may find [a] defendant guilty of a crime without finding that he personally performed the act, or engaged in the conduct required for the commission of that crime. A defendant is guilty of a crime if he is an accomplice of another person who commits that crime. He is an accomplice if with the intent of promoting or facilitating the commission of the crime, he solicits, commands, encourages, requests the other person to commit it, or aids, agrees to aid, or attempts to aid the other person in planning or committing it.
>
> An accomplice is one who knowingly and voluntarily cooperates, or aids another in committing a crime. He is not merely a passive bystander who happens to observe an illegal act and does not participate in it. Nor is he someone who sees a crime being committed and fails to report it to the police. Instead, an accomplice is someone who knowingly, voluntarily, and purposely joins with someone else in performing an illegal act.

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> You may find the defendant guilty of a crime on the theory that he was an accomplice as long as you are satisfied beyond a reasonable doubt that the crime was committed and that the defendant was an accomplice of the person who committed it.

(Tr. at 1516-17).

In a colloquy before Judge Sabo completed his charge to the jury, Mr. Gallagher, Hartey's counsel, objected to several aspects of the accomplice instruction. After Mr. Gallagher called Judge Sabo's attention to Hartey's proposed points for charge on accomplice liability, the following discussion ensued:

> THE COURT: I've already told them about an accomplice.
>
> MS. FOULKES: That's right.
>
> MR. GALLAGHER: Is that that they're going to have to consider the evidence in this trial given each defendant separately? I don't understand.
>
> THE COURT: No, no, no. The evidence is against the one individual separately. But, the other is an accomplice of that individual. Then, he is equally liable. He doesn't have to pull the trigger.
>
> In other words . . .

MR. GALLAGHER: Well, that would be two separate charges, and I'm requesting point 4.

THE COURT: No, no. Denied.

* * *

MR. GALLAGHER: Okay. My objections are noted.

THE COURT: Yes, okay.

(Tr. at 1536-38).

Although these objections might have been more strenuous, Mr. Gallagher had another opportunity to contest the accomplice charge when the jury requested a supplemental instruction on accomplice liability. At that time Mr. Gallagher argued vigorously that the court should instruct the jury that the two defendants could be guilty of different degrees of homicide despite their complicity in the same underlying act. The colloquy went as follows:

THE COURT: I have a note from the jurors. It says: "Can two people being tried for the same charge be innocent or guilty of different degrees of murder?" . . . In other words, what they want to know is whether the accomplice necessarily would be guilty of the same theory of murder, the same degree of murder. Technically, yes. But —

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* * *

> THE COURT: They can come in with an inconsistent verdict all the time.
>
> MR. GALLAGHER: Well, I think Your Honor's answered the question. I mean, legally there is no question. They can do that. They can find the defendants guilty of different degrees.

(Tr. at 1544-45).

The trial court and the prosecutor agreed that such an "inconsistent verdict" was possible, but were under the impression that it was a form of nullification, rather than application, of the law. (See Tr. at 1546-48). Therefore, the trial court refused to instruct the jury that under the law they could find an accomplice guilty of a different degree of homicide. (Tr. at 1548, 51). Mr. Gallagher, however, insisted that different verdicts would be entirely consistent with the law, and demanded that the jury be instructed as such. (Tr. at 1548-53). To the jury's question, Mr. Gallagher replied:

> MR. GALLAGHER: I say that the answer to the question is yes.
>
> THE COURT: No, I can't.
>
> MR. GALLAGHER: Two people —
>
> THE COURT: I can't just answer the question yes.

MR. GALLAGHER: Well, Your Honor, the question is very clear. If that is not their answer, then you can ask them, does that satisfy your —

THE COURT: No, no, no.

MS. FOULKES: Because, that's not the answer.

THE COURT: Then, I've got to tell them to rephrase their question because there is a dispute as to what you really mean.

MR. GALLAGHER: Well, there is no dispute with me.

THE COURT: Well, there is a dispute with me.

MR. GALLAGHER: Two individuals charged with the same crime.

THE COURT: Yes.

MR. GALLAGHER: That's what it says.

THE COURT: And can they be found guilty of different degrees of murder?

MR. GALLAGHER: Absolutely.

THE COURT: They can't. Technically, they can't.

MR. GALLAGHER: Why can't they. There is no legal reason.

THE COURT: The way to answer that is no and yes.

MS. FOULKES: Exactly.

MR. GALLAGHER: I don't know. What's the no?

THE COURT: No, they should not.

MR. GALLAGHER: Why shouldn't they?

MS. FOULKES: One is the accomplice.

MR. GALLAGHER: They didn't ask anything about an accomplice. In fact, I'm going to object if he brings anything in, or if he rereads anything. If you bring out accomplice —

THE COURT: Well, the only thing I can do is I can bring them in and tell them to rephrase that question.

(Tr. at 1551-53). When the jury rephrased their question as "Please explain what an accomplice is according to law," Judge Sabo responded by rereading the accomplice instruction he had given in the initial charge. (Tr. at 1554-56).

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Hartey's trial counsel might have been more effective had he argued, as present counsel now argues, that Hartey could not be convicted of a specific intent crime like first degree murder without an individualized determination of his own specific intent to kill.[2] But the *Strickland* analysis is highly deferential to the trial lawyer, and judges the "reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Sistrunk*, 96 F.3d at 670. It presumes that trial counsel was reasonably effective unless the convicted defendant can prove otherwise. *See id.*

Courts rarely find that trial counsel failed to meet *Strickland*'s standard of representation. *See United States v. Kauffman*, 109 F.3d 186, 190 (3d Cir. 1997) (finding ineffective assistance where counsel wholly failed to investigate potential insanity defense). They have found conduct objectively deficient only where counsel's performance was so egregiously lacking as to throw into question the fairness of the process itself. *See id.*; *Berryman v. Morton*, 100 F.3d 1089, 1097-1101 (3d Cir. 1996) (failure to investigate potentially exculpatory witness or impeach prosecution witness with inconsistent testimony); *Frey v. Fulcomer*, 974 F.2d 348, 363 (3d Cir. 1992) (failure to argue right law to jury).

Strickland's purpose is only "to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Strickland*, 466 U.S.

2. Although Judge Sabo implicitly rejected this proposition when he refused to instruct the jury that the defendants could be guilty of different degrees of murder.

at 688. It establishes a right to counsel who will make a reasonable investigation, be actively engaged in the trial, and make decisions based on a coherent strategy. *See Government of Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1431 (3d Cir. 1996) (finding counsel's decision not to call tainted juror to either defendant or court's attention reasonable under circumstances). But as long as counsel fulfills this basic role, *Strickland* entrusts the defendant to the justice of the court system in which he was tried.

In this case, Hartey's trial counsel more than fulfilled his representational role. He proposed points of charge that addressed his concerns about accomplice liability. He argued them to the trial court, preserving his objections. When the jury requested the supplemental instruction, he argued his position tenaciously, again preserving his objections. Nothing was deficient in counsel's performance. Judge Sabo simply found against him.[3]

Therefore, the Court rejects Hartey's contention that his trial counsel offered him ineffective assistance of counsel by failing to object to Judge Sabo's accomplice liability instruction.

2. *Instruction Was Not Prejudicial*

Most of Hartey's brief, and all of his supplemental brief, is dedicated to showing that Judge Sabo's accomplice instruction was prejudicial. The crux of his argument is that

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3. Finally, all of these objections ultimately received appellate review. *See Commonwealth v. Hartey*, 621 A.2d 1023, 1028 (Pa. Super. 1993).

the instruction, quoted above, invited the jury to convict him of first degree murder without finding that he had the specific intent to kill required by Pennsylvania law. *See* 18 Pa. Cons. Stat. Ann. § 2502(a) (1983 & Supp. 1997); *Commonwealth v. Bachert*, 453 A.2d 931, 935 (Pa. 1982).

The difficulty with Hartey's claim is that Judge Sabo did instruct the jury that it could not convict either defendant of first-degree murder without finding that he had a specific intent to kill. He said:

> [I]n order to find the defendants guilty of murder of the first degree, you must find that the killing was a willful, deliberate and premeditated act. You must ask yourself the question, did the defendants have the willful, deliberate, and premeditated specific intent to kill at the time of the killing?

(Tr. at 1524). What is more, Judge Sabo used a standard Pennsylvania accomplice instruction that the Pennsylvania Supreme Court has recently upheld against an identical attack. *See Commonwealth v. Gaskins*, 692 A.2d 224, 228 (Pa. 1997); *Commonwealth v. Thompson*, 674 A.2d 217, 222 (Pa. 1996); *Commonwealth v. Chester*, 587 A.2d 1367, 1384-85 (Pa. 1991). *See also Commonwealth v. Hartey*, 621 A.2d 1023, 1028 (Pa. Super. 1993). Therefore, as the Gaskins Court found, because the jury was properly charged, trial counsel could not be ineffective "for it is axiomatic that counsel cannot be ineffective for failing to raise a meritless issue." *Gaskins*, 692 A.2d at 228.

In his supplemental brief, however, Hartey further argues that the Third Circuit's recent opinion in *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997) nevertheless requires a finding that Judge Sabo's instruction was prejudicial. As the following paragraphs explain, the Third Circuit's reasoning in *Smith* is not applicable to this case.

In *Smith*, two co-defendants were tried for robbing a pharmacy at gun point, and shooting and killing a robbery victim in the process. *Id.* at 404. Because first-degree murder requires proof of a specific intent to kill, and felony murder constitutes only second-degree murder under Pennsylvania law, *see* 18 Pa. Cons. Stat. Ann. § 2502(b) (1983 & Supp. 1997); *Smith*, 120 F.3d at 410, a crucial issue in the trial was which defendant actually committed the killing and whether the other shared his intent to kill. The trial court charged the jury with a standard accomplice instruction that did not address the subtle distinction between an accomplice in the robbery and an accomplice in the murder itself. *See id.* at 404-06. On habeas review, the Third Circuit found that the instruction violated Due Process because it permitted the jury to confuse the status of *accomplice to the underlying robbery* with the status of *accomplice to the homicide. See id.* at 411. The precise defect it found was that the instruction relieved the prosecution of the burden of proving the specific intent element of the homicide crime. *See id.* at 415.

The *Smith* Court feared that if the jury found the defendant to be an accomplice in the underlying robbery, it might make the following error in reasoning. First, the jury would think of the defendant as an "accomplice for all purposes," *id.* at 414 — as if that status could exist apart

from a particular crime. Second, it would consider the jury instruction: "A defendant is guilty of a crime if he is an accomplice of another person who commits that crime." Finally, the jury would reason that the defendant, an accomplice in the robbery, committed first-degree murder by virtue of the fact that his accomplice in the robbery committed first degree murder. The fallacy in this reasoning, of course, is that the jury never found that the defendant had a specific intent to kill the victim, as the statute requires.

In the present case, there is no second crime with respect to which the jury could have found Hartey an accomplice. Therefore, there was no danger that Judge Sabo's accomplice instruction would permit the jury to commit the error of reasoning that the Third Circuit identified in Smith.

B. ***Failure to Object to Improper Bolstering***

Hartey also renews his argument that his trial counsel was ineffective in failing to object to allegedly improper bolstering of John Barth's testimony in (1) the prosecutor's opening statement, and (2) the testimony of Joseph Murray, Chief of the District Attorney Office's Homicide Unit. The Court adopts Magistrate Angell's finding that Judge Sabo was able to cure any prejudice that those statements might have caused Hartey, and that Hartey did in fact receive appellate review of those rulings.

An appropriate Order follows.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 96-6812

PATRICK HARTEY

v.

DONALD T. VAUGHN, et al.

ORDER

AND NOW, this 12th day of November, 1997, upon consideration of the Petitioner's Objections and Supplemental Objections to the Report and Recommendation of the Magistrate Judge and Respondent's Responses thereto, IT IS HEREBY ORDERED that Magistrate Angell's Report and Recommendation is **ADOPTED** and **APPROVED**.

IT IS FURTHER ORDERED THAT the Petition for Habeas Corpus is **DENIED** and **DISMISSED** without an evidentiary hearing. There is no probable cause to appeal.

BY THE COURT:

s/ Herbert J. Hutton, J.
HERBERT J. HUTTON, J.

APPENDIX E — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED APRIL 1, 1997 AND FILED APRIL 2, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 96-6812

PATRICK HARTEY

v.

DONALD T. VAUGHN, et al.

REPORT AND RECOMMENDATION

M. FAITH ANGELL
UNITED STATES MAGISTRATE JUDGE

April 1, 1997

Presently before this Court is a counseled Petition for Writ of Habeas Corpus filed, pursuant to 28 U.S.C. §2254, by a state prisoner. Petitioner is currently incarcerated at S.C.I. Graterford, where he is serving life imprisonment for first degree murder and related crimes. For the reasons which follow, it is recommended that the Petition for Writ of Habeas Corpus be denied and dismissed without an evidentiary hearing.

Appendix E

I. BACKGROUND[1]

On August 20, 1982, following a jury trial before the Honorable Albert F. Sabo of the Philadelphia Court of Common Pleas, Petitioner was found guilty of murder in the first degree, criminal conspiracy and possession of an instrument of crime.[2] During the penalty phase of the trial, the jury returned a verdict of life imprisonment.

The facts underlying the convictions, as summarized by the trial court, are as follows:

> "At approximately 4:10 P.M. on August 11, 1980, Officers Edward Cervonka and Mary Ann Colfer of the Philadelphia Police Department responded to a radio call of a shooting and hospital case at Fletcher and Sepviva Streets.
>
> Upon arrival at this location the officers were met by an eyewitness, William Hopkins. As a result of a conversation with Hopkins, Cervonka and Colfer proceeded to a garage located at 2206 E. Fletcher Street and observed what appeared to be bloodstains on the sidewalk. The officers gained entry into the garage and observed more bloodstains on the floor.

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1. In preparing this Report and Recommendation I have reviewed the following documents: Mr. Hartey's §2254 petition and Memorandum in Support; the Commonwealth's response; and the state court records.

2. Mr. Hartey was tried with a co-conspirator, Thomas McCandless, who was also convicted of murder and related charges.

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While Cervonka and Colfer were conducting the initial investigation inside the garage, a Rescue Unit was in the process of removing the victim, Theodore Stebelski, from the highway at 2213 Sepviva Street. Stebelski was taken to St. Mary's Hospital where he was subsequently pronounced dead at 4:35 P.M.

A post-mortem examination performed by Dr. Robert Catherman of the Medical Examiner's Office revealed the cause of death to be two gunshot wounds to the shoulder and trunk of the body. The manner of death was ruled a homicide.

William Hopkins was interviewed by homicide investigators and subsequently testified at the trial of this matter. Hopkins heard what sounded like gunshots coming from the garage on Fletcher Street. Shortly after the shots were fired, Hopkins saw Theodore Sebelski crash through the garage door and collapse on the sidewalk. The victim picked himself up and ran around the corner to a blue Buick parked on Sepviva Street. The victim fell against the top of this car and slid down to the pavement.

Shortly thereafter, Hopkins observed another male, later identified as John Barth, leaving the garage. Barth ran approximately ten feet on Fletcher Street before returning to the garage to assist another man in lifting the garage door from the roof of a blue Chevrolet which was attempting

to exit. Once the door was lifted by Barth and the other individual, the Chevrolet, driven by a man with black hair, exited the garage and sped the wrong way on Fletcher Street.

Barth subsequently ran to the blue Buick parked on Sepviva Street. He then grabbed the victim by the back of the neck and began shaking him. This prompted Hopkins to yell out to Barth to let the victim alone because he had been shot. Hopkins was able to observe the license plate on the Buick.

Homicide investigators determined that the garage located at 2206 E. Fletcher Street was rented by defendant Thomas McCandless. It was also determined that McCandless had a 1955 Chevrolet similar to the one seen leaving the garage by Hopkins.

On November 6, 1980, Detective Frank O'Brien of the Homicide Division came into contact with McCandless. After advising the defendant of his rights, Detective O'Brien questioned him about the murder of Theodore Stebelski. The defendant gave Det. O'Brien a statement but refused to sign it. McCandless was not charged with the Stebelski murder at that time.

John Barth was subsequently arrested in connection with the Stebelski homicide. At a preliminary hearing in March 1982, Barth was held for court on a murder charge.

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In September, 1981, after negotiations between the District Attorney's Office and Barth's attorney, Richard P. Haaz, Esq., Barth agreed to give Det. O'Brien a statement concerning the Stebelski homicide. This statement implicated the defendants Thomas McCandless and Patrick Hartey.

As a result of the information provided by co-defendant John Barth, complaints and warrants for the arrest of Thomas McCandless and Patrick Hartey were issued on September 15, 1981. At the time both defendants were incarcerated in New Jersey.

On May 28, 1981 the Commonwealth began extradition proceedings for Thomas McCandless under the Interstate Agreement on Detainers Act. 42 Pa. C.S.A. §9101. This was in connection with charges unrelated to the murder offense. The defendant fought extradition. However, on February 17, 1982, McCandless was extradited and arrested in New Brunswick, New Jersey.

On September 16, 1981, the Commonwealth began extradition proceedings for defendant Patrick Hartey. He too contested extradition. On March 4, 1982, however, extradition proceedings for Hartey were completed and the defendant was arrested in New Brunswick, New Jersey.

Defendant McCandless was charged under April Term, 1982: #276 Involuntary

> Manslaughter; #277 Murder, Voluntary Manslaughter; #278 Criminal Conspiracy; #279 Possession Instrument of Crime Generally, Possession Instrument of Crime Concealed Weapon, Prohibited Offensive Weapon.
>
> Defendant Hartey was charged under April Term, 1982: #280 Involuntary Manslaughter; #281 Possession Instrument of Crime Generally, Possession Instrument of Crime Concealed Weapon, Prohibited Offensive Weapon; #282 Criminal Conspiracy; #283 Murder, Voluntary Manslaughter." *See* Exhibit "A" to the Commonwealth Response to the Habeas Petition (Petitioner's *Allocatur* Brief, Appendix, May 17, 1985 Opinion of Judge Sabo) at pp. 1-5.

Mr. Hartey filed post-verdict motions. After a hearing on the motions, Judge Sabo denied them and sentenced Petitioner to life imprisonment for murder, with concurrent terms of five (5) to ten (10) years for criminal conspiracy and two and one-half (2 1/2) to five (5) years for possession of an instrument of crime.

In a *nunc pro tunc* direct appeal to the Superior Court of Pennsylvania, Mr. Hartey raised the following six claims of error[3]:

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3. It was not until his fourth attempt to appeal that Mr. Hartey's issues were brought to the attention of the Superior Court. On direct appeal, his counsel failed to file a timely appellate brief. On his subsequent three PCHA petitions, each counsel secured reinstatement of Mr. Hartey's appellate rights and then failed to file timely appellate briefs.

Appendix E

"I. [Whether] trial counsel was ineffective for failing to preserve his objections to the improper bolstering of the Barth preliminary hearing testimony in his written post trial motions, and was also ineffective for failing to object to the improper bolstering in her opening address?

II. [Whether] trial counsel was ineffective for failing to object to the court's exclusion of defense witnesses who would have testified to the poor reputation for truth and veracity on the part of the most critical Commonwealth witness, John Barth?

III. [Whether] trial counsel was ineffective for failing to object to the court's charge which directed the attention of the jury to the state of mind of the shooter, and permitted appellant's conviction based on the state of mind of the shooter and not based on his state of mind, and which never informed the jury that in order to convict appellant of first degree murder it had to find, beyond a reasonable doubt, that he harbored the specific intent to kill the victim?

IV. [Whether] trial counsel was ineffective for failing to properly preserve his objection to the court's refusal to answer the first jury inquiry in the affirmative?

V. [Whether] trial counsel was ineffective for failing to request a flight charge as to the missing witness, John Barth?

> VI. [Whether] the cumulative effect of these errors on counsel's part deprived appellant of anything close to a fair trial?

In a Memorandum and Order dated March 16, 1993, the Superior Court affirmed the trial court.

On appeal to the Supreme Court of Pennsylvania, Mr. Hartey presented the first four issues which he had presented to the Superior Court. On August 18, 1994, the Supreme Court denied discretionary review.

On October 4, 1996, Mr. Hartey filed the instant habeas petition. In it he raises four grounds which he argues entitle him to habeas relief [4] All four grounds were presented to the state Superior Court, and then to the state Supreme Court.

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4. Petitioner's habeas grounds read as follows:

> "1. Trial counsel was ineffective for failing to object to the Court's accomplice instruction which permitted the conviction of an accomplice based on his joining the actor in 'an illegal act' and failed to focus the attention of the jury on whether or not the accomplice shared or harbored the specific intent to kill that had to be found as to the actor.
>
> 2. Trial counsel was ineffective for failing to preserve his objections to the improper bolstering of the Barth preliminary hearing testimony in his written post trial motions, and was also ineffective for failing to object to the improper bolstering of the Barth testimony by the prosecutor in her opening address.

(Cont'd)

Appendix E

II. DISCUSSION

A. *Exhaustion.*

The exhaustion rule, codified in 28 U.S.C. §2254,[5] requires a federal court to postpone habeas corpus jurisdiction, absent exceptional circumstances, until the state is given "the initial 'opportunity to pass upon and correct'

(Cont'd)

3. Trial counsel was ineffective for failing to object to the Court's exclusion of defense witnesses who would have testified to the poor reputation for truth and veracity on the part of the most critical Commonwealth witness, John Barth.

4. Trial counsel was ineffective for failing to properly preserve his objection to the Court's refusal to answer the first jury inquiry in the affirmative."

5. The exhaustion requirements of 28 U.S.C. §2254 provide:

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

alleged violations of its prisoners' federal rights". *Picard v. Connor*, 404 U.S. 270, 275 (1971) (quoting *Wilwording v. Swenson*, 404 U.S. 249, 250 (197 1)). *See Castille v. Peoples*, 109 S.Ct. 1056, 1059 (1989).

In order to demonstrate compliance with the exhaustion requirement, a habeas petitioner must show that each claim which forms the basis of his habeas petition has been "fairly presented" to the state courts. *Castille*, 109 S. Ct. at 1060; *Picard*, 404 U.S. at 275. The fair presentation requirement is met when the claim presented in the state court is the "substantial equivalent" of the claim asserted in the petitioner's federal habeas petition. *Picard*, 404 U.S. at 278. *See Lesko v. Owens*, 881 F.2d 44, 50 (3rd Cir. 1989) (*citing Picard*), *cert. denied*, 110 S.Ct. 759 (1990); *Bisaccia v. Atty Gen. of New Jersey*, 623 F.2d 307, 310 (3d Cir.) (quoting *Picard*), *cert. denied*, 101 S.Ct. 622 (1980). It is not necessary for the purposes of exhaustion that the state court rule on the merits of the claim(s) presented to it. *Sullivan v. Cuyler*, 723 F.2d 1077, 1082 (3d Cir. 1983); *Gonce v. Redman*, 780 F.2d 333, 336 (3d Cir. 1985).

It is clear in the instant case that all four of Petitioner's habeas claims have been exhausted in the state system as they have been presented to both the Pennsylvania Superior and Supreme Courts. Thus, I will turn to the merits of the habeas issues presented.

B. *Merits*.

All four of Mr. Hartey's claims allege ineffective assistance of counsel.

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In order for Mr. Hartey to establish ineffective assistance of counsel under the *Strickland* standard, he must show: [1] that counsel's performance was "deficient" and [2] that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To demonstrate that counsel's performance was deficient, a defendant must show that counsel's representation fell below an objective standard of reasonableness based on the facts of the particular case, viewed as of the time of counsel's conduct. *Senk v. Zimmerman*, 886 F.2d 611, 615 (3d Cir. 1989) (quoting *Strickland*, 466 U.S. at 688, 690).

To establish prejudice, a petitioner must demonstrate a reasonable probability that, but for unprofessional errors, the result would have been different. This standard is less strict than the "more likely than not" standard. *Frey v. Fulcomer*, 974 F.2d 348, 358 (3d Cir. 1992). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 358 (*quoting Strickland*, 466 U.S. at 694).

1. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT'S ACCOMPLICE INSTRUCTION.

In his first claim of ineffective assistance of counsel, Mr. Hartey claims that counsel failed to object to the Court's "incomplete and misleading" accomplice instruction. According to Mr. Hartey, the accomplice instruction which was given improperly allowed the jury to convict him of first degree murder without proof that he harbored the requisite specific intent to kill.

While the record is not entirely clear, I will assume for the purposes of this Report and Recommendation that trial counsel did not object to the accomplice instruction.[6]

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6. Upon review of the state court record, it appears that trial counsel did in fact object to the accomplice instruction, as suggested in the following sidebar exchange:

> "TRIAL COUNSEL: Your Honor, since we haven't gone over these points for charge individually, I take it that your ruling is that they are covered in your charge?
>
> COURT: Yes.
>
> TRIAL COUNSEL: Okay. Okay. Well, I would request that the Point No. 6 and No. —
>
> COURT: I covered 6. Let me look at that. (Whereupon the Court examines a document).
>
> (Later) I don't know what you're talking about. (Whereupon the Court presents the document to the District Attorney who examines same.)
>
> D.A.: It' almost his exact words.
>
> COURT: I know.
>
> D.A.: I think that was his exact words.
>
> TRIAL COUNSEL: Point No. 4 —
>
> COURT: I've covered 6.
>
> TRIAL COUNSEL: Okay, fine. (Whereupon Defense Counsel presents the document to the Court indicating Point No. 4).
>
> (Cont'd)

Without reaching the issue of whether trial counsel's performance was deficient, I do not believe that Mr. Hartey can meet the prejudice prong of the *Strickland* standard.

Before a federal court may overturn a conviction resulting from a state trial in which a challenged jury instruction is used, it must be established not merely that the instruction was undesirable, erroneous, or even "universally condemned", but that it violated some right

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(Cont'd)

COURT: I already told them about an accomplice.

D.A.: That's right.

TRIAL COUNSEL: Is that that they're going to have to consider the evidence in this trial given each defendant separately? I don't understand.

COURT: No, no, no. The evidence is against the one individual separately. But, the other is an accomplice of that individual. Then, he is equally liable. He doesn.t have to pull the trigger. In other words —

TRIAL COUNSEL: Well, that would be two separate charges, and I'm requesting Point 4.

COURT: No, no. Denied.

* *

TRIAL COUNSEL: Okay. My objections are noted.
COURT: Yes, okay.

N.T. 8/19/82 at 1535-1538.

which was guaranteed to the defendant by the Fourteenth Amendment. A single instruction may not be judged in artificial isolation, but must be viewed in the context of the overall charge. The question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973).

Under Pennsylvania law, to determine the kind of homicide of which an accomplice is guilty, it is necessary to look at his state of mind; the requisite mental state must be proved beyond a reasonable doubt to be one which the accomplice harbored and cannot depend upon proof of intent to kill only in the principal. *Commonwealth v. Bachert*, 499 Pa. 398, 453 A.2d 931 (1982), *cert. denied*, 460 U.S. 1043 (1983).

In his charge to the jury, Judge Sabo gave an accomplice instruction which is consistent with the Pennsylvania statutory definition.[7] He told the jurors that they were

7. The jury was charged as follows:

> "Under the law of Pennsylvania, you may find the defendant guilty of a crime without finding that he personally performed the act, or engaged in the conduct required for the commission of that crime. A defendant is guilty of a crime if he is an accomplice of another person who commits that crime. He is an accomplice if with the intent of promoting or facilitating the commission of the crime, he solicits, commands, encourages, requests the other person to commit it, or aids, agrees to aid, or attempts to aid the other person in planning or committing it.

(Cont'd)

permitted to find "the defendant guilty of a crime on the theory that he was an accomplice as long as [they were] satisfied beyond a reasonable doubt that the crime was committed and that the defendant was an accomplice of the person who committed it". *See* N.T. 8/19/82 at 1516-17.

In the jury charge, Judge Sabo also told the jurors that they would have to consider each defendant separately and that it was the Commonwealth's burden to prove beyond a reasonable doubt that either defendant is guilty. The jurors were instructed that it was their duty to determine the guilt or innocence of either defendant, and that in order to find the defendants guilty of any class of criminal homicide, they had to find that the Commonwealth had proven each and

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(Cont'd)

> An accomplice is one who knowingly and voluntarily cooperates, or aids another in Committing a crime. He is not merely a passive bystander who happens to observe an illegal and does not participate in it. Nor is he someone who sees a crime being committed and fails to report it to the police. Instead, an accomplice is someone who knowingly, voluntarily, and purposely joins with someone else in performing an illegal act." *See* N.T. 8/19/82 at 1516.
>
> 18 Pa.C.S.A. §306(b) defines an accomplice as follows:
>
> "A person is an accomplice of another person in the commission of an offense if: (1) with the intent of promoting or facilitating the commission of the offense he: (I) solicits such other person to commit it; or (ii) aids or agrees or attempts to aid such other person in planning or committing it; or (2) his conduct is expressly declared by law to establish his complicity.

every essential element of that class of criminal homicide beyond a reasonable doubt. N.T. 8/19/82 at 1500, 1502, 1518.

With regard to murder in the first degree, the jurors were told that the defendants were being tried under a statute which defined first degree murder as an intentional killing. Judge Sabo went on to say:

> "Thus, in order to find the defendant, or either defendant, guilty of murder in the first degree you must find first that the defendants caused the death of another person, or that an accomplice caused the death of another person. That, is you must find that the defendant or his accomplice's act or acts is the legal cause of death of Theodore Stebelski and thereafter, you must determine if the killing was intentional.
>
> Now, what is an intentional killing?
>
> Section 2502(D) of the same Crimes Code provides verbatim, or word for word, as follows:
>
> Intentional killing. Killing by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing. Therefore, in order to find the defendants guilty of murder of the first degree, you must find that the killing was a wilful, deliberate, and premeditated act. You must ask yourself the question, did the defendants have the wilful, deliberate, and premeditated specific intent to kill at the time of the killing." N.T. 8/19/82 at 1524.

Based upon my review of the record, I must agree with the Defendant that the instructions on accomplice liability may have been confusing, as evidenced by the jurors' question to Judge Sabo during the course of deliberations.[8] However, viewing the jury instructions as a whole, and recognizing that "the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction"[9], I believe that any confusion created did not rise to the level of constitutional violation. The jurors were specifically told that they must consider each defendant separately, that the Commonwealth carried the burden of proving each and every element of the crimes charged and that in order to find the defendants guilty of first degree murder, they had to decide whether the defendants had a wilful, deliberate and premeditated specific intent to kill at the time of the killing. The giving of the challenged instruction, viewed in context, did not render Mr. Hartey's conviction of first degree murder constitutionally invalid.

2. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PRESERVE HIS OBJECTIONS TO THE BOLSTERING OF BARTH'S TESTIMONY.

Petitioner asserts that trial counsel was ineffective for failing to object to the prosecutor's opening comments in which she improperly bolstered the testimony of

8. During the course of deliberations, the jury sent the following question to the trial judge: "Can two people being tried for the same charge be innocent or guilty of different degrees of murder?" *See* N.T. 8/19/82 at 1544.

9. *Cupp v. Naughton*, 414 U.S. at 147 (1973).

Commonwealth witness, John Barth.[10] In addition, Mr. Hartey also asserts that counsel was ineffective for failing to raise the issue of improper bolstering of this same Commonwealth witness through the testimony of the Chief of Homicide, Joseph Murray. Mr. Hartey acknowledges that

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10. The challenged comment reads as follows:

> "Now, Barth was arrested as a result of identification proceeding which occurred in March of 1981 and he was held for court in June of '81. And that in September of that year, he determined or he contacted through his attorney the District Attorney's office and indicated that he was willing to name the shooter and other people involved, the other person involved in this matter and cooperate fully with the District Attorney's office.
>
> As a result of that, he agreed to give a statement to the District Attorney's office with the proviso that the statement could not be used against him in any criminal proceedings and with an agreement from the District Attorney's office that bail which he presently could not post could be reduced to something which he could make, and the bail was in fact reduced to his putting up his house for bail.
>
> He gave a statement to the District Attorney's office and at that particular stage no deals were made as to the disposition of his own charges. **Other steps were taken to verify whether Mr. Barth's statement was accurate and after such steps were taken, the District Attorney's office agreed that John Barth's testimony against Thomas McCandless and Pat Hartey at trial, the charges against him would be nolle prossed, which means dropped; those charges would be dropped.**"

counsel objected at trial, but faults him for failing to raise the issue in post-verdict motions and, therefore, failing to preserve the issue for appellate review. According to Mr. Hartey, Mr. Barth was obviously a weak witness, and realizing this, the Commonwealth engaged in a deliberate plan to improperly bolster his testimony by fortifying it with the prosecutor's comments, and with Mr. Murray's testimony, that Barth's story was consistent with, and confirmed by, an investigation conducted by law enforcement authorities.

As with Mr. Hartey's first claim, I do not believe that he can meet the second prong of the *Strickland* test. Whether or not counsel erred in failing to preserve the issue of improper bolstering of John Barth by Joseph Murray's testimony, I see no prejudice as a result. As Petitioner acknowledges, this issue was raised on direct appeal and was decided adversely to him.

Because the issue was considered and decided on the merits by the Superior Court, any deficiency in trial counsel's failure to preserve this issue did not affect Petitioner's rights on appeal.

With regard to counsel's failure to object to the prosecutor's comments during her opening statement, Petitioner is correct in arguing that generally, it is improper for a prosecutor to vouch for the veracity of a government witness. *U.S. v. Ciancaglini*, 945 F.Supp. 813, 824 (E.D.Pa. 1996).

"Vouching may occur in two ways: the prosecutor may place the prestige of the government behind the witness or

may indicate that information not presented to the jury supports the witness's testimony." *Id.* (*quoting United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980)).

Where a defendant alleges ineffective assistance of counsel in failing to object to improper vouching by the prosecutor, the court must review the prosecutor's comments pursuant to the harmless error doctrine to determine whether the defendant received a fair trial, before it can decide whether it was unreasonable not to object. *Id.*

In the instant case, to the extent that the prosecutor suggested that Mr. Barth's testimony had been supported by an investigation, she improperly vouched for his testimony. A nonconstitutional error, such as the improper bolstering of Mr. Barth's testimony, is harmless when "it is *highly probable* that the error did not contribute to the judgment." The reviewing court is to look at the scope of the objectionable comment, and its relationship to the entire proceeding, the ameliorative effect of any curative instructions given, and the strength of the evidence supporting the defendant's conviction. *See U.S. v. Zehrbach*, 47 F.3d 1252, 1265 (3d Cir. 1995).

Based upon my review of the record, I conclude that the prosecutor's improper remark does not rise to the level of reversible error for the following reasons: (1) the remark was made during opening statements and was prefaced by a reminder from the prosecutor that what she, and defense counsel, said was not evidence, and that the jury was free to disregard any comments by her which was not borne out of

the evidence presented at trial[11]; (2) in both his opening remarks and his final charge to the jury, Judge Sabo instructed the jurors that they were not bound by any opinion that he or the attorneys might express concerning the credibility of witnesses[12]; and (3) there was other evidence which corroborated Mr. Barth's statement. *See* Exhibit "A" to the Commonwealth's response, the March 16, 1993 Opinion of the Superior Court, at 5-6.

Absent a showing of prejudice, Mr. Hartey's second ineffective assistance of counsel claim must also fail.

3. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE EXCLUSION OF DEFENSE WITNESSES.

In his third claim of ineffective assistance of counsel, Mr. Hartey contends that counsel improperly failed to object when the trial court ruled that the defense could not present testimony to the effect that John Barth had a poor reputation in the community for truth and veracity.

Nowhere in the record are the alleged potential witnesses identified. In raising the issue with the trial judge, counsel for co-defendant McCandless stated, "There are some witnesses, but I don't have their dames, so I can't give them to you. They're supposed to be here this afternoon, as to who will testify that knew John Barth in the neighborhood, and knew other people who knew him." *See* N.T. 8/12/82 at

11. *See* N.T. 8/9/82 at 479.

12. *See* N.T. 8/9/82 at 470-471; N.T. 8/19/82 at 1503-04.

1071. Mr. Hartey has never identified these individuals nor has he shown that they, were, in fact, available to testify at trial. With "vague and conclusory allegations that some unspecified and speculative testimony might have established his defense", Mr. Hartey cannot meet his burden to show that trial counsel made errors so serious that his representation fell below an objective standard of reasonableness. *See Zettlemoyer v. Fulcomer*, 923 F.2d 284, 298 (3d Cir.), *cert. denied*, 502 U.S. 902 (1991). *See also United States v. Dawson*, 857 F.2d 923, 928 (3d Cir. 1988).

4. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PRESERVE HIS OBJECTION TO THE COURT'S REFUSAL TO ANSWER THE JURY'S INQUIRY.

In his final ineffective assistance claim, Mr. Hartey argues that trial counsel erred in failing to properly preserve his objection to Judge Sabo's refusal to answer a jury inquiry during deliberations. After being sent out to deliberate, the jury sent in the following question: "Can two people being tried for the same charge be innocent or guilty of different degrees of murder?" Judge Sabo declined to answer the question, because he felt that there was a dispute as to what the jurors meant. He called the jurors back in and instructed them to rephrase their question. The question that came back was, "Please explain what an accomplice is according to law." Judge Sabo then repeated the accomplice charge. *See* N.T. 8/19/82 at 1544-56. Mr. Hartey contends that Judge Sabo should have answered the jurors' question in the affirmative, and his failure to "accurately respond" to the jurors' inquiry denied him a fair trial.

Because this issue was raised and considered on direct appeal, I see no prejudice as a result of counsel's alleged failure to preserve the issue. Thus, Mr. Hartey has not met his burden of establishing ineffective assistance of counsel under the *Strickland* standard.[13]

RECOMMENDATION

Consistent with the above discussion, it is recommended that Mr. Hartey's petition for habeas corpus, pursuant to 28 U.S.C. §2254, be DENIED AND DISMISSED WITHOUT AN EVIDENTIARY HEARING. It is further recommended a finding be made that there is no probable cause to appeal.

BY THE COURT:

s/ M. Faith Angell
M. Faith Angell
UNITED STATES MAGISTRATE JUDGE

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13. I am not unmindful that errors which individually do not rise to the level of required prejudice can have a cumulative effect on a defendant's trial. In the instant case, I do not believe the errors alleged, either individually or as a group, require reversal of Mr. Hartey's conviction.

APPENDIX F — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT DATED MARCH 23, 1995

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 223 E.D. ALLOCATUR
DKT. 1993

COMMONWEALTH OF PENNSYLVANIA

V.

PATRICK HARTEY,

PETITIONER

ORDER

Petition For Reconsideration
From the Superior Court

PER CURIAM:

AND NOW, this 23rd day of March, 1995, the Petition for Reconsideration in the above matter is denied.

Mr. Justice Montemuro is sitting by designation.

TRUE COPY FROM THE RECORD
Attest: 3/23/95

s/ John W. Person, Esquire

Deputy Prothonotary
Supreme Court of Pennsylvania
Eastern District

APPENDIX G — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT DATED AUGUST 18, 1994

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 223 E.D. ALLOCATUR
DKT. 1993

COMMONWEALTH OF PENNSYLVANIA

V.

PATRICK HARTEY,

PETITIONER

Petition for Allowance of Appeal
from the Superior Court

ORDER

PER CURIAM:

AND NOW, this 18th day of August, 1994, the Petition for Allowance of Appeal in the above matter is hereby denied.

Mr. Justice Montemuro is sitting by designation as Senior Justice pursuant to Judicial Assignment Docket No. 94 R1801, due to the unavailability of Mr. Justice Rolf Larsen, see No. 127 Judicial Administration Docket No. 1, filed October 28, 1993.

Appendix G

TRUE COPY FROM RECORD
Attest: August 18, 1994

s/ Patricia Johnson
PATRICIA JOHNSON
Chief Clerk
Supreme Court of Pennsylvania
Eastern District

APPENDIX H — OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA DATED AND FILED MARCH 16, 1993

COMMONWEALTH of Pennsylvania

v.

Patrick HARTEY, Appellant.

Superior Court of Pennsylvania.

Argued Sept. 22, 1992.

Filed March 16, 1993.

* * *

Before WIEAND, FORD ELLIOTT and HOFFMAN, JJ.

HOFFMAN, Judge:

This is an appeal from a judgment of sentence for first degree murder,[1] criminal conspiracy,[2] and possession of an instrument of crime.[3] Appellant, Patrick Hartey, raises six issues on appeal.

> I. [Whether] trial counsel was ineffective for failing to preserve his objections to the improper

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1. 18 Pa.C.S.A. § 2502(a).

2. 18 Pa.C.S.A. § 903.

3. 18 Pa.C.S.A. § 907.

bolstering of the Barth preliminary hearing testimony in his written post trial motions, and was also ineffective for failing to object to the improper bolstering in her opening address?

II. [Whether] trial counsel was ineffective for failing to object to the court's exclusion of defense witnesses who would have testified to the poor reputation for truth and veracity on the part of the most critical Commonwealth witness, John Barth?

III. [Whether] trial counsel was ineffective for failing to object to the court's charge which directed the attention of the jury to the state of mind of the shooter, and permitted appellant's conviction based on the state of mind of the shooter and not based on his state of mind, and which never informed the jury that in order to convict appellant of first degree murder it had to find, beyond a reasonable doubt, that he harbored the specific intent to kill the victim?

IV. [Whether] trial counsel was ineffective for failing to properly preserve his objection to the court's refusal to answer the first jury inquiry in the affirmative?

V. [Whether] trial counsel was ineffective for failing to request a flight charge as to the missing witness, John Barth?

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> VI. [Whether] the cumulative effect of these errors on counsel's part deprived appellant of anything close to a fair trial?

Appellant's Brief at i-ii.

Following a joint trial with co-defendant Thomas McCandless appellant was convicted of first degree murder, criminal conspiracy, and possession of an instrument of crime on August 20, 1982. Post-trial motions were filed and denied and on April 17, 1984, appellant was sentenced to life imprisonment. Appellant's trial counsel took a timely appeal but failed to file a timely appellate brief which resulted in the dismissal of appellant's appeal on September 20, 1985.

Michael McAllister replaced trial counsel and secured the reinstatement of direct appellate rights after a PCHA proceeding on May 20, 1987 in which other relief requested by appellant was denied. Mr. McAllister took a timely appeal to this court, however he too failed to file a timely appellate brief and the appeal was dismissed.

This unfortunate procedure repeated itself once again when Mr. Vincent Lorusso, appellant's third attorney, secured appellant's right to take a direct appeal after filing a PCHA petition, and subsequently failed to file a timely brief. The third appeal was then dismissed on March 28, 1988.

Present counsel for appellant filed a PCRA petition seeking to have direct appellate rights reinstated on May 23, 1990. The PCRA Court granted the right to appeal *nunc pro tunc* on March 6, 1992. This timely appeal followed. For the reasons that follow, we affirm.

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Appellant first contends that trial counsel was ineffective for failing to object and preserve for appeal the improper bolstering of Commonwealth witness John Barth. Specifically, he argues that trial counsel was ineffective for failing to preserve for appeal his objection to the improper bolstering of the Barth testimony by Commonwealth witness Joseph Murray and for failing to object to the improper bolstering of Barth's testimony by the prosecutor in her opening statement. We disagree.

Counsel is presumed to be effective and the burden of demonstrating ineffectiveness rests on appellant. *Commonwealth v. Pierce*, 515 Pa. 153, 159, 527 A.2d 973, 975 (1987). To prevail on a claim of ineffectiveness, appellant must show that his underlying contention possesses arguable merit, that the course chosen by counsel had no reasonable basis designed to serve his interests and that counsel's conduct prejudiced him. *Commonwealth v. Davis*, 518 Pa. 77, 83, 541 A.2d 315, 318 (1988). In the instant case appellant's underlying contentions regarding bolstering by the Commonwealth are meritless.

Mr. Murray, the Assistant District Attorney who had negotiated the agreement with Barth, was called by the prosecution to explain the full extent of the agreement. It is well-settled that the Commonwealth has a duty not to conceal the existence of a promise or of an agreement to recommend a specific sentence or leniency for a crucial prosecution witness. *Commonwealth v. Hallowell*, 477 Pa. 232, 383 A.2d 909 (1978); *Commonwealth v. Weismann*, 401 Pa.Super. 62, 70, 584 A.2d 980, 984 (1990), *allocatur denied* 528 Pa. 644, 600 A.2d 195 (1991); *Commonwealth v. Floyd*, 259 Pa.Super.

552, 393 A.2d 963 (1978); *Commonwealth v. Kurtz*, 219 Pa.Super. 1, 280 A.2d 410 (1971). Such agreements have a significant bearing on the witnesses' motive for testifying and hence their credibility. Thus, they should be fully, fairly and honestly disclosed when they come into question at trial. *Floyd*, 259 Pa.Super. at 558-59, 393 A.2d at 966-67; *Kurtz*, 219 Pa.Super. at 4, 280 A.2d at 411.

In the instant case Barth testified at the preliminary hearing that it was his understanding that the Commonwealth would drop the murder charge against him if he testified against the co-defendants. N.T. 8/10/82 at 787. However, Barth's agreement with the Commonwealth was in fact more favorable than Barth's testimony indicated. Therefore, Murray testified to the additional terms included in the agreement with the Commonwealth, namely that the Commonwealth agreed to assist Barth in having his bail reduced, and that Barth was released on bail. N.T. 8/11/82 at 803, 814.

Appellant however contends that in giving this testimony, Murray improperly bolstered Barth's credibility when he testified that he told Barth that the deal would only be valid if Barth's story was corroborated by the District Attorney's investigation. This court has recognized that improper bolstering or vouching for witnesses by the Commonwealth occurs in two situations: "(1) When the prosecution places the prestige of the government behind the witness by personal assurances of the witness's veracity; and (2) when the prosecution indicates that information which is not before the jury supports the witnesses testimony." *Commonwealth v. Reed*, 300 Pa.Super. 224, 230, 446 A.2d 311, 314 (1982).

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In the instant case Mr. Murray expressed no personal opinion as to the truthfulness of Mr. Barth's testimony. Nevertheless, the court gave the jury a cautionary instruction in relation to Mr. Murray's testimony as follows:

> In evaluating the testimony of Joseph Murray, Chief of the Homicide Unit of the District Attorney's Office, who testified this morning, if you interpreted any of his responses to the questions to include any opinion by him of the truthfulness of the witness Barth's statement, then his testimony as to that matter should be disregarded by you and you should understand that such testimony was not offered for that purpose. You, as the jury, are the sole finders of the facts and, as such, the credibility of all witnesses."

N.T. 8/11/82 at 920-21. Therefore, any possible prejudice to the appellant from Murray expressing a personal opinion about the veracity of witness Barth was eliminated.

Additionally, Murray did not refer to matters outside the evidence in relating the terms of the agreement with Barth, as the corroborative information resulting from the investigation was presented to the jury. A medical examiner's testimony, corroborated three important aspects of Barth's testimony. First, the medical examiner's testimony that the victim suffered head injuries in addition to fatal gunshot wounds, N.T. 8/12/82 at 1014-16, was consistent with Barth's testimony that the co-defendant struck the victim on the head with a pistol, N.T. 8/10/82 at 779-80, 789-91.

Second, he stated that the head injuries probably occurred prior to the shooting as Barth described. N.T. 8/12/82 at 1016-17; N.T. 8/10/82 at 779-80, 789-91. Third, both testified that the victim was shot in the back. N.T. 8/12/82 at 1013-14; N.T. 8/10/82 at 780.

Moreover, Barth's testimony that the co-defendant accused the victim of spying on his wife before he killed the victim was corroborated by evidence that the victim had fired a gun at the parked car of the co-defendant's wife. N.T. 8/10/82 at 780; N.T. 8/11/82 at 954-56. Also Barth's testimony that the co-defendant was the gunman was corroborated by a ballistics expert who testified that the victim was killed with either a .38 special or a .357 Magnum and the victim's brother, who saw the co-defendant threaten the victim with a similar-sized gun after the victim had testified against the co-defendant at a preliminary hearing. N.T. 8/10/82 at 781; N.T. 8/11/82 at 864-66; N.T. 8/11/82 at 932-35. Finally, Barth's claim that the co-defendant rented the garage where the shooting occurred was fully corroborated by independent testimony. N.T. 8/10/82 at 783; N.T. 8/11/82 at 824-30; N.T. 8/12/82 at 997- 1001.

Thus, the jury was presented with extensive evidence corroborating Barth's statement. Therefore, Murray's statement relating to the corroboration of Barth's testimony cannot then be construed as referring to facts not before the jury.[4]

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4. Moreover, this court has recognized that an Assistant District Attorney's testimony concerning the general procedures employed to verify information received from a witness does not improperly

(Cont'd)

Similarly, then, the prosecutor's reference to steps taken to verify Barth's testimony referred to Murray's testimony and the other testimony presented which corroborated Barth's testimony. It was thus a fair characterization of the evidence presented by the Commonwealth and squarely within the parameters of a proper opening statement. *See, e.g., Commonwealth v. Stetler*, 494 Pa. 551, 431 A.2d 992 (1981) (prosecutor's opening statement should be a fair deduction from evidence that the Commonwealth in good faith expects to develop). Accordingly appellant's underlying contention is without merit, and hence counsel cannot be deemed ineffective.

Appellant next contends that trial counsel was ineffective for failing to object to the trial court's exclusion of defense witnesses who would have testified to the poor reputation for truth and veracity of Commonwealth witness, John Barth. We disagree.

As stated previously, in order to prevail on an ineffectiveness claim, appellant must first demonstrate that his underlying claim has merit. In the instant case, trial counsel for appellant's co-defendant offered to present several witnesses, whose names he did not know, whom he claimed would testify to Commonwealth witness Barth's bad reputation for truth and veracity in the community.

(Cont'd)
bolster the witness' credibility. *Commonwealth v. Vidmosko*, 393 Pa.Super. 236, 243-44, 574 A.2d 96, 99 (1990), *allocatur denied* 527 Pa. 645, 593 A.2d 418 (1991). In this case, the witness's mere reference to "corroborating" a statement by "investigation" was clearly proper.

N.T. 8/12/82 at 1071-72; N.T. 8/13/92 at 1242. The court precluded these alleged witnesses from testifying.

While it is well established that witnesses may be impeached by evidence of bad reputation for truth or veracity,[5] we decline to find counsel ineffective for failing to object to the court's exclusion of so tenuous an offer of proof by co-defendant's trial counsel. Neither the identities nor the actual availability of the alleged witnesses was established. In addition, there is no evidence in the record regarding these witnesses. Accordingly, we find that appellant's underlying claim is without merit.

Moreover, appellant was not prejudiced by the absence of reputation testimony to attack the credibility of Commonwealth witness Barth. The jury already had before it abundant evidence attacking Barth's credibility. The jury was aware that Barth himself was charged with the murder, that he made a deal in order to be released on bail and to have the murder charges dropped, and that he had failed to appear for trial. N.T. 8/11/82 at 803, 818, 820. In addition, the defense introduced evidence that Barth had admitted to several others that he had committed the murder and was trying to pin it on the co-defendants. N.T. 8/12/82, at 1082-83, 1115, 1128-29, 1132-34, 1151-52. Barth had also admitted on cross-examination that he had used a false name, that of co-defendant McCandless, when he had been arrested in an unrelated matter. N.T. 8/10/82 at 788-89. Finally, the

5. *See Commonwealth v. Gaddy*, 468 Pa. 303, 362 A.2d 217 (1976); *In the Interest of Lawrence J.*, 310 Pa.Super. 351, 456 A.2d 647 (1983); *Commonwealth v. Hansell*, 185 Pa.Super. 443, 137 A.2d 816 (1958).

trial court issued an accomplice/corrupt source charge with respect to Barth, instructing the jury to look upon his testimony with disfavor, and to accept it only with "caution and care." N.T. 8/19/82 at 1509.

Thus, as there was extensive impeachment evidence introduced concerning Barth's credibility, and motive to testify falsely, as well as the court's charge, any additional evidence attacking Barth's credibility would have been merely cumulative. Appellant therefore cannot demonstrate that the absence of this cumulative evidence affected the outcome of the trial. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Commonwealth v. Petras*, 368 Pa.Super. 372, 377, 534 A.2d 483, 485 (1987) (citations omitted); *Commonwealth v. Jennings*, 405 Pa.Super. 590, 597-99, 592 A.2d 1370, 1374-75 (1991) *allocatur denied* 529 Pa. 632, 600 A.2d 952 (1991). Accordingly, appellant's ineffective assistance of counsel claim must fail.

Appellant next contends that trial counsel was ineffective for failing to object to the trial court's jury charge. Specifically, appellant argues that the court's charge directed the attention of the jury to the state of mind of the co-defendant and permitted appellant's conviction based on the state of mind of the co-defendant. Appellant asserts that the court never informed the jury that in order to convict appellant of first degree murder it had to find, beyond a reasonable doubt, that appellant had the specific intent to kill. We disagree.

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The trial court's charge on accomplice liability and on the required mens rea for first degree murder was entirely proper. The court's charge on accomplice liability mirrored the relevant statutory definitions.[6] Moreover, the court explicitly instructed the jury that in order to find appellant guilty as an accomplice to first degree murder, they would have to ask themselves "did the defendants have the willful, deliberate, and premeditated specific intent to kill at the time of the killing." N.T. 8/19/82 at 1524. Thus, the jury was instructed that in order for appellant to be found guilty both he and his co-defendant had to have the specific intent to kill. Appellant's claim therefore that the jury instruction was improper is meritless. *See Commonwealth v. Chester*, 526 Pa. 578, 613-14, 587 A.2d 1367, 1384-85 (1991) *cert. denied*, __ U.S. __, 112 S.Ct. 422, 116 L.Ed.2d 442 (1991).

Appellant next contends that his trial counsel was ineffective for failing to properly preserve his objection to the court's refusal to answer the first jury inquiry in the affirmative. We disagree.

The nature of the court's response to inquiries from the jury is within the discretion of the court, so long as the court accurately instructs the jury on the appropriate legal principles involved. *Commonwealth v. Tervalon*, 463 Pa. 581, 592, 345 A.2d 671, 677 (1975); *Commonwealth v. Haddle*, 271 Pa.Super. 418, 422, 413 A.2d 735, 738 (1979); *Commonwealth v. Fried*, 382 Pa.Super. 156, 163, 555 A.2d 119, 122 (1989) *allocatur denied* 522 Pa. 623, 564 A.2d 915 (1989). Here, the jury asked the court: "Can two people being

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6. *See* 18 Pa.C.S.A. §§ 306(c), 2502(a), (d).

tried for the same charge be guilty of different degrees of murder?" N.T. 8/19/82 at 1554. There was a dispute between appellant's trial counsel and the assistant district attorney about what the jury was asking, so the court asked the jury to clarify their question. N.T. 8/19/82 at 1553. The jury then returned with the question "please explain what an accomplice is according to the law?" N.T. 8/19/82 at 1554. The court then properly reinstructed the jury on accomplice liability. This was proper and within the courts discretion. *See Commonwealth v. Washington*, 274 Pa.Super. 560, 567-68, 418 A.2d 548, 552 (1980) (rejecting claim that court erred in reinstructing the jury in lieu of responding with a yes or no answer). Thus, appellant's underlying claim is meritless and his ineffectiveness claim must fail.

Appellant next claims that trial counsel was ineffective for failing to request a flight charge as to Commonwealth witness Barth. Once again we disagree.

A flight charge is appropriate "when a person commits a crime, knows that he is wanted therefor, and flees or conceals himself, such conduct is evidence of consciousness of guilt and may form the basis in connection with other proof from which guilt may be inferred." *Commonwealth v. Coyle*, 415 Pa. 379, 393, 203 A.2d 782, 789 (1964). The charge is usually given where the accused has exhibited such guilty behavior. This court has suggested that the charge should also be available "to a defendant with regard to another's guilty behavior where the accused defends on that basis." *Commonwealth v. Wyche*, 320 Pa.Super. 483, 487, 467 A.2d 636, 637-38 (1983).

However, we do not believe a flight charge was appropriate in the instant case. Barth had entered into an agreement with the Commonwealth pursuant to which he would not be prosecuted for the murder of the victim if he testified at the preliminary hearing and at trial. Therefore, the only way Barth would be "wanted" for the crime in the instant matter was if he failed to testify. Therefore, it cannot be stated that Barth fled in order to avoid prosecution. Without this fear being the motivation for his flight or failure to appear, it is not probative of consciousness of guilt. *Commonwealth v. Jones*, 457 Pa. 563, 576, 319 A.2d 142, 149 (1974), *cert. denied*, 419 U.S. 1000, 95 S.Ct. 316, 42 L.Ed.2d 274 (1974). Accordingly, a flight charge was not appropriate in the instant case. Thus, appellant's claim of ineffective assistance of counsel is meritless.

Appellant's final claim is that the cumulative effect of the aforementioned allegations of ineffective assistance of counsel deprived appellant of a fair trial and hence require that appellant be granted a new trial. In light of our resolution of the previous issues, this claim is meritless. Accordingly, we affirm the judgment of sentence.

Affirmed.